TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1912~~ 1913

No. ~~799~~.309

THE METZGER MOTOR CAR COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN W. PARROTT.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

FILED JULY 23, 1912.

(23,305)

(23,305)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 730.

THE METZGER MOTOR CAR COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN W. PARROTT.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 14, 1912.

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PRAECIPE FOR SUMMONS.

STATE OF MICHIGAN.
THE CIRCUIT COURT FOR THE COUNTY OF MACOMB.

John W. Parrott

vs.

Metzger Auto Company, a Corporation.

To the Clerk of said Court:

Let a writ of summons issue in the above entitled cause. Action of trespass on the case. Damages $3,000.

Dated Sept. 10, 1910.

Silas B. Spier,
Attorney for plaintiff.

Filed Sept. 10, 1910. Flora E. Posner, Deputy County Clerk.

ORDER AMENDING SUMMONS.

At a general term of the Circuit Court for the County of Macomb continued and held at the Court House in the City of Mt. Clemens, in said county, on Monday the third day of October in the year of our Lord one thousand nine hundred and ten.

Present, Hon. Byron R. Erskine, Circuit Judge.

The court was opened for business in due form.

John W. Parrott

vs.

Metzger Automobile Company, a Corporation, etc.

Upon reading and filing affidavit of S. B. Spier, attorney for plaintiff in above entitled cause, and upon motion by him made therein, ordered that name of defendant be amended and

changed to the "Metzger Motor Car Company, a Corporation, etc." and that an alias summons be issued accordingly.

Read, corrected and approved in open court this 17th day of November, A. D. 1910.

Byron R. Erskine,
Circuit Judge.

PLURIES SUMMONS.

STATE OF MICHIGAN.
THE CIRCUIT COURT FOR THE COUNTY OF MACOMB.

In the name of the people of the State of Michigan:

To Metzger Motor Car Company, a foreign corporation, doings business in this state.

You are hereby notified that a suit has been commenced against you in said court by John W. Parrott as plaintiff, and that if you desire to defend the same, you are required to have your appearance filed or entered in the cause, in accordance with the rules and practice of the court, in person or by attorney, within fifteen days after service of this summons upon you.

Hereof fail not, under penalty of having judgment taken against you by default.

The plaintiff claims damages in said suit not exceeding Three Thousand ($3,000) Dollars.

Service of this summons shall be made on or before the 30th day of December, A. D. 1910, which is the return day hereof.

Witness, The Hon. Henry J. McKay, Circuit Judge, and the seal of said court, at the City of Mt. Clemens, the place of holding said court, this 2nd day of December, A. D. 1910.

(Seal of the Court.) William F. Kracht,
Clerk.

Silas B. Spier,
Plaintiff's Attorney.
Business Address: Mt. Clemens, Mich.

State of Michigan, County of Wayne, ss:

I hereby certify and return that on the 5th day of December, A. D. 1910, at the City of Detroit, in said county, I served the within summons personally on Metzger Motor Car Company, a foreign corporation, doing business in this state, the defendant named in said summons, by then and there, at the place and on the date above mentioned, showing to said above

named defendant, Byron E. Everitt, President and Agent of said Metzger Motor Car Company, the within summons with the seal impressed thereon, and delivering to said defendant, Byron E. Everitt, President and Agent as aforesaid, a true copy of said summons.

My fees $1.50 paid.

George T. Gaston.

By Joseph Dickson, Deputy Sheriff of Said County.

Filed December 17, 1910. Flora E. Posner, Deputy County Clerk.

NOTICE OF RETAINER AND PRAECIPE FOR APPEARANCE.

STATE OF MICHIGAN.
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB.

John W. Parrott,

Plaintiff,

vs.

Metzger Motor Car Company, a Corporation,

Defendant.

To Silas B. Spier, Esq.,
Attorney for Plaintiff.

Sir:—

Please take notice that we have been retained as attorneys for the defendant in the above entitled cause, and have this day caused the appearance of such defendant to be entered herein.

Yours, etc.,

Brennan, Donnelly & Van DeMark,
Attorneys for Defendant.

To the Clerk of the Said Court:

Please enter our appearance as attorneys for the defendant, the Metzger Motor Car Company in the above entitled cause.

Yours, etc.,

Brennan, Donnelly & Van DeMark,
Attorneys for Defendant.

Filed February 9th, 1911. Flora E. Posner, Deputy County Clerk.

DECLARATION.

STATE OF MICHIGAN.
THE CIRCUIT COURT FOR THE COUNTY OF MACOMB.

John W. Parrott,

Plaintiff,

vs.

The Metzger Motor Car Co., a Corporation,

Defendant.

Now comes John W. Parrott by Silas B. Spier, his attorney and complains of the Metzger Motor Car Company, a foreign corporation duly incorporated doing business under the laws of this state, which has been duly summoned herein to answer the plaintiff in a plea of trespass on the case;

For that whereas the said Metzger Motor Car Company being then and there the owner of a motor vehicle called an automobile, on or about the 12th day of July, 1910, at about the hour of midnight, did then and there operate, or by its agents and servants cause to be operated, driven and propelled, on and along the Gratiot road, a public highway or street running in a northerly direction from the City of Detroit in the County of Wayne to the City of Mt. Clemens, in the County of Macomb, in said State of Michigan, said motor vehicle called an automobile, whereby it became and was the duty of the said Metzger Motor Car Company, its agents and servants, under the laws of the State of Michigan, and especially under Act No. 318, of the Session Laws of the State of Michigan for the year 1909, to operate, drive and propel the said motor vehicle, automobile, upon and along said highway at no greater rate of speed than was reasonable and proper, having regard to the traffic and use of said highway, and so as not to endanger the life or limb of any person or the safety of any property, and also at said hour of the night to display at least two lighted lamps on the front of said motor vehicle, so lighted that the light therefrom should be visible at least two hundred (200) feet in the direction in which said vehicle was then going, and, whereas, it was then and there the duty of the said Metzger Motor Car Company, its agents and servants upon meeting or approaching said plaintiff who was then driving a horse and leading two other horses on said public highway, to slow down his said motor vehicle to a speed not exceeding ten miles an

hour, and to give reasonable warning of its approach and to use every reasonable precaution to insure the safety of said plaintiff and his horses and vehicle and other persons occupying the same. Yet the said defendant, the Metzger Motor Car Company, its agents, servants, etc., well knowing their duty in the premises as aforesaid, and while the plaintiff was driving in a careful and prudent manner and a very moderate speed a horse hitched to a two-wheel cart and leading two other horses, said cart being occupied by plaintiff, his son and one Tom Barry and being driven in a northerly direction over and along the said highway, and the right side of the wrought portion thereof, in the Township of Clinton, Macomb County, Michigan, at or about the hour of 12 o'clock, midnight, on July 12, 1910, and while said plaintiff was then and there exercising due care and caution and without negligence on his part, the said defendant did wilfully, wantonly, and with gross carelessness and negligence, by its agents, servants and chauffeur, drive and propel its said motor vehicle the same being a very heavy automobile at a criminally careless rate of speed, to-wit: At a rate of upwards of 25 miles an hour and then and there without slowing down to a rate of ten miles an hour and without having its front lights lighted so that it might have seen plaintiff and his horses and without taking any other proper precautions and without giving any reasonable warning to plaintiff of the approach of said automobile as they were in duty bound to do, did then and there drive and propel said automobile onto and against and upon the horses and cart and person of said plaintiff, and striking the same with such force and violence as to destroy said cart of plaintiff and did then and thereby tear and destroy the harness on the horse, and did greatly injure all three of said horses and did so injure one of them that it afterwards died, and so injured another that it was necessary to kill the same, and then and thereby did throw the plaintiff from his cart to the ground with great force and violence, and fractured his ribs and greatly injured him in all his limbs and in his whole body, wrenching, straining and injuring his back, chest, hips and greatly injured him internally and did then and thereby greatly injure, bruise and wound the whole body of said plaintiff both internally and externally.

And plaintiff avers that because of the said wanton and gross act of negligence, and because of the said negligence and wrongful acts of said defendant, his agents, servants and chauffeur as aforesaid, he the said plaintiff, while he was exercising due care and caution and guilty of no negligence on his part,

was hurt, bruised, mutilated and permanently injured and became sick, sore, lame and disabled both internally and externally, and has from the time of said negligent and wrongful acts of the said defendant, and because thereof the said plaintiff has been compelled to suffer great and excruciating pains, mentally and physically. That he was and still is severely and permanently injured, internally and otherwise, and the said plaintiff by reason of the premises; and without any fault on his part, but wholly through the wanton and gross negligence of the said defendant, has been obliged to incur great expense in procuring necessary nursing and medical care, and has by reason thereof been kept from performing his ordinary business and avocation and at times now greatly suffers from said injuries and that said injuries are permanent in their effects, and that the plaintiff has by reason of said premises and will be in the future deprived of divers gains, profits and advantages which he might and would have otherwise derived and acquired; that he has been compelled to employ help and assistance to perform the work which he himself performed prior to said injuries, and that during his confinement to his house it was for a long period his business was at a standstill and he was thereby greatly injured; said plaintiff further alleging that prior to the injuries herein complained of he was a strong, robust and healthy man.

And plaintiff avers that because of defendants wrongful acts herein set forth, and because of the said injuries so received by him he was forced to spend large sums of money for physicians, drugs, nursing and medicines in endeavoring to be cured of his injuries, to-wit, the sum of $200 and that he has lost two horses with the value of $200, and cart and harness of a value of $50 and that he has otherwise been injured and damaged to the sum of $5,000 and therefore he brings suit, etc.

Silas B. Spier,
Attorney for Plaintiff.

Filed April 5, 1911. William F. Kracht, County Clerk.

PETITION OF METZGER MOTOR CAR COMPANY, DEFENDANT, FOR THE REMOVAL OF SAID CAUSE TO THE CIRCUIT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

STATE OF MICHIGAN.
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB.

John W. Parrott,

Plaintiff,

vs.

Metzger Motor Car Company, a New York Corporation,

Defendant.

To the Circuit Court of Macomb County, State of Michigan:

Your petitioner, the Metzger Motor Car Company, respectfully represents that it is the defendant in the above entitled cause, and that it is a non-resident of the state in which said suit was brought, viz., the State of Michigan; that the matter and amount in dispute in said suit exceeds, exclusive of interest and costs, the sum or value of Two Thousand Dollars ($2000.00); that said suit is of a civil nature, and that plaintiff in his declaration claims in substance that while he was driving on or along the Gratiot road, a public highway or street, running in a northerly direction from the City of Detroit, in the County of Wayne and State of Michigan, to the City of Mount Clemens, in the County of Macomb in said State of Michigan, on or about the 12th day of July, A. D. 1910, that the defendant, Metzger Motor Car Company, by one of its agents or employees, was driving a motor vehicle known as an automobile along said highway at a high rate of speed, and that the driver of said automobile did not give warning of his approach and did not have the lamps on the front of said motor vehicle lighted, and that he carelessly and recklessly came into collision with the wagon in which said plaintiff was driving, causing certain severe personal injuries to plaintiff, also injuring plaintiff's horses, damaging his wagon, and causing other loss and injury to the plaintiff by reason of said collision, and that this cause is brought by said plaintiff to recover damages for such injuries and loss occasioned thereby.

That the controversy in said suit is wholly between the citizens of different states, and can be fully determined as between them, that is to say, as between your petitioner, which avers that it was, at the time of the bringing of this suit and still is a non-resident of the State of Michigan, but was on said date and still is a corporation organized and existing under the laws of the State of New York, and was and still is a citizen and resident of the State of New York, and the said Plaintiff, who, as your petitioner avers, was then and still is a citizen and resident of the State of Michigan;

That the time of your petitioner, the defendant, to answer or plead to the said declaration has not yet expired, and will not expire until the 25th day of April, A. D. 1911. Your petitioner offers herewith a good and sufficient bond, with good and sufficient sureties, for the entering in said Circuit Court of the United States, Southern Division, on the first day of its next session, a transcript of the record in this suit, and for paying all costs that may be awarded by said Circuit Court if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this Honorable Court to proceed no further herein, except to make an order for the removal of this cause to said Circuit Court and to accept said bond and to cause a transcript of the record herein to be removed into the Circuit Court of the United States for the Eastern District of Michigan, Southern Division, and your petitioner will ever pray.

Metzger Motor Car Company,
By Frank M. Brennan.

State of Mchigan, County of Wayne, ss.

I, Frank M. Brennan being duly sworn, depose and say that I am one of the attorneys for the petitioner in the above entitled cause; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

Frank M. Brennan.

Subscribed and sworn to before me this 14th day of March, A. D. 1911.

Philip H. Robinson,
Notary Public, Wayne County, Michigan.

My commission expires March 27, 1914.

Filed April 14, 1911. William F. Kracht, County Clerk.

BOND ON REMOVAL.

STATE OF MICHIGAN.
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB.

John W. Parrott,

Plaintiff,

vs.

Metzger Motor Car Company, a New York Corporation,

Defendant.

Know All Men by These Presents, That the Fidelity and Deposit Company of Maryland, a foreign corporation, authorized to do a bonding business in the State of Michigan, is held and firmly bound unto John W. Parrott, plaintiff in the above entitled cause, his heirs, successors and assigns, and to whomsoever there may be entitled to enforce this bond, in the sum of five hundred dollars ($500.00), lawful money of the United States of America, to the payment of which well and truly to be made, the Fidelity and Deposit Company of Maryland binds itself, its successors and assigns, firmly by these presents.

The conditions of this obligation are such that:

Whereas, the said Metzger Motor Car Company, defendant in the above entitled cause, has applied by petition to the Circuit Court of the State of Michigan, in and for the County of Macomb, for the removal of a certain cause therein pending, wherein John W. Parrott is plaintiff, and the said Metzger Motor Car Company is defendant, to the Circuit Court of the United States for the Eastern District of Michigan, Southern Division, for further proceedings on grounds in said petition set forth, and that all proceedings in said action in said Macomb Circuit Court be stayed.

Now, therefore, if the said Metzger Motor Car Company, as aforesaid, shall enter in the said Circuit Court of the United States for the Eastern District of Michigan, Southern Division, as aforesaid, on or before the first day of the next regular session, a transcript of the record in said suit, and shall pay or cause to be paid all costs that may be awarded therein by said Circuit Court of the United States if said court shall hold that said suit is wrongfully or imporperly removed thereto, then

this obligation shall be void; otherwise to remain in full force and effect.

Fidelity and Deposit Company of Maryland,
By Chas. Whitaker, (L. S.)
(Corporate Seal) Agent.
By Alexander Munroe, (L. S.)
Attorney-in-Fact.

Filed April 14, 1911. William F. Kracht, County Clerk.

ORDER REMOVING CAUSE TO UNITED STATES CIRCUIT COURT.

STATE OF MICHIGAN.
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB.

At a session of said court continued and held in the court room thereof in the City of Mt. Clemens on the 14th day of April, A. D. 1911.

Present: The Hon. Henry J. McKay, Circuit Judge.

John W. Parrott,
Plaintiff,
vs.
Metzger Motor Car Company, a New York Corporation,
Defendant.

This cause coming on to be heard upon application of the defendant herein for an order removing this cause to the United States Circuit Court for the Eastern District of Michigan, Southern Division, and it appearing to the Court that defendant has filed his petition for such removal in due form of law, and has filed therewith a bond duly conditioned with good and sufficient sureties as provided by law; and it appearing to the court that this is a proper cause for removal to said Circuit Court.

Now, Therefore, It is Hereby Ordered that this cause be and it is hereby removed to the United States Circuit Court for the Eastern District of Michigan, Southern Division, and the clerk is hereby directed to make up a transcript of the record of said cause for transmission to said court forthwith.

Henry J. McKay,
Circuit Judge.

Filed April 14, 1911. William F. Kracht, County Clerk.

CERTIFICATE OF JUDGE AND CLERK TO TRANSCRIPT.

CIRCUIT COURT FOR SAID COUNTY.

State of Michigan, County of Macomb, ss.

I, William F. Kracht, Clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and seal of said court, this 24th day of April, A. D. 1911.

William F. Kracht,
(Seal of Court) Clerk.

I, Henry J. McKay, Presiding Judge of said court, do certify that the foregoing attestation by William F. Kracht, Clerk of the said court, to be in due form.

Witness my hand and seal this 24th day of April, A. D. 1911.

Henry J. McKay,
(Seal of Court) Presiding Judge.

I, William F. Kracht, Clerk of said Court, do hereby certify that the Honorable Henry J. McKay, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, Presiding Judge of said court, duly commissioned and qualified.

Witness my hand and the seal of said court, this 24th day of April, A. D. 1911.

William F. Kracht,
(Seal of Court) Clerk.

Transcript filed April 27, 1911. M. J. Cavanaugh, Clerk.

PLEA OF GENERAL ISSUE.

UNITED STATES OF AMERICA.
IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

No. 8729.

John W. Parrott,
Plaintiff,

vs.

Metzger Motor Car Company, a New York Corporation,
Defendant.

And now comes the said defendant, by Brennan, Donnelly & Van De Mark, its attorneys, and demands a trial of the matters set forth in the plaintiff's declaration.

Brennan, Donnelly & Van De Mark,
Defendant's Attorneys.

Filed April 28, 1911. Martin J. Cavanaugh, Clerk.

AMENDED DECLARATION.

STATE OF MICHIGAN.
THE CIRCUIT COURT FOR THE COUNTY OF MACOMB.

No. 7234, Transferred to The U. S. District Court, as No. 8729, Eastern District, Southern Division.

John W. Parrott,
Plaintiff,

vs.

The Metzger Motor Car Co., a Corporation,
Defendant.

And now comes John W. Parrott by Silas B. Spier and Franklin P. Monfort, his attorneys and complain of the Metzger Motor Car Company a foreign corporation duly incorporated, doing business under the laws of this state, which has been duly summoned herein to answer the plaintiff, in a plea of trespass on the case.

For that whereas the said Metzger Motor Car Company being then and there the owner of a motor vehicle called an automobile, on or about the 12th day of July 1910 at about the hour of midnight did then and there operate, or by its agents and servants caused to be operated, driven and propelled on and along the Gratiot road, a public highway or street, running in a northerly direction from the City of Detroit in the County of Wayne to the City of Mt. Clemens in the County of Macomb in the said State of Michigan, said motor vehicle, called an automobile, whereby it became and was the duty of the said Metzger Motor Car Company, its agents and servants, under the laws of the State of Michigan, and especially under Act No. 318, of the Session Laws of the State of Michigan for the year 1909 to operate, drive, and propel the said motor vehicle automobile upon and along said highway at no greater rate than was reasonable and proper having regard to the traffic and use of said highway and so as not to endanger the life or limb of any person or the safety of any property, and also at said hour of the night to display at least two lighted lamps on the front of said motor vehicle, so lighted that the light therefrom should be visible at least two hundred (200) feet in the direction in which said vehicle was then going.

And, whereas, it was then and there the duty of the said Metzger Motor Car Company, its agents and servants upon meeting or approaching said plaintiff who was then driving a horse and leading two other horses on said public highway, to slow down said motor vehicle to a speed not exceeding ten miles an hour, and to give reasonable warning of its approach and to use every reasonable precaution to insure the safety of the said plaintiff and his horses and vehicle and other persons occupying the same. Yet the said defendant the Metzger Motor Car Company, its agents, servants, etc., well knowing their duty in the premises as aforesaid, and while the plaintiff was driving in a careful and prudent manner and a very moderate speed a horse hitched to a two-wheeled cart and leading two other horses, said cart being occupied by plaintiff, his son and one Tom Barry and being driven in a northerly direction over and along said highway on the right side of the wrought portion thereof in the Township of Clinton, Macomb County, Michigan, at or about the hour of 12 o'clock, midnight, on July 12, 1910, and while said plaintiff was then and there exercising due care and caution and without negligence on his part said defendant did wilfully, wantonly and with great carelessness and negligence by its agents, servants and chaffeur, drive and propel its said motor vehicle the same being a very heavy

automobile at a criminally careless rate of speed, to-wit, at a rate of upwards of 25 miles an hour, and then and there without slowing down to a rate of ten miles an hour and without having front lights lighted so that might have seen plaintiff and his horses and without having taken any other precaution and without giving any reasonable warning to plaintiff of the approach of said automobile as they were in duty bound to do, did then and there drive and propel said automobile onto and against and upon the horses and cart and persons of said plaintiff and striking the same with force and violence as to destroy said cart of the plaintiff and did then and thereby destroy the harness on the horse and did greatly injure all three of said horses and did so injure one of them that it afterwards died and so injured another, that it was necessary to kill the same, and did then and thereby throw the plaintiff from his cart to the ground with great force and violence, and fractured his ribs and greatly injuring him in all his limbs and in his whole body, wrenching, straining and injuring his back, chest, hips, and greatly injured him internally by loosening and otherwise injuring his kidneys and liver, all of which injuries are permanent, and did then and thereby greatly, injure, bruise and wound the whole body of said plaintiff, both internally and externally.

And the plaintiff avers that because of said and gross act of negligence and because of said negligence and wrongful acts of said defendant, his agents, servants and chauffeur as aforesaid, he the said plaintiff, while he was exercising due care and caution and guilty of no negligence on his part, was hurt, bruised, mutilated and permanently injured and became sick, sore, lame and disabled and disordered, both internally and externally, and from the time of said negligence and wrongful acts of the said defendant, etc., and because thereof the said plaintiff has been compelled to suffer great and excruciating pain and suffering mentally and physically.

That he was and still is severely and permanently injured internally by loosening his kidneys and injury to his liver and lungs and otherwise greatly injured.

And the said plaintiff by reason of the premises, and without any fault on his part, but wholly through the want and gross negligence of the said defendant, his agents, servants and chauffeur, has been obliged to incur great expense in procuring necessary nursing and medical care and attendance and by reason thereof been kept from performing his ordinary business and avocation and at times now greatly suffers from said injuries and that said injuries are permanent in their effects and

that the plaintiff by reason of the premises will be in the future deprived of gains, profits and advantages which he might and could otherwise have derived and acquired; that he has been compelled to employ help and assistance to perform the work which he himself performed prior to said injuries that confined him to his house; and that during his confinement to his house for a long period, his business was at a standstill and he was thereby greatly injured.

And the plaintiff further alleges that prior to the injuries herein complained of he was a strong, robust and healthy man.

And the plaintiff avers because of defendants wrongful acts and the premises herein set forth; and because of the said injuries so received by him he was forced to spend large sums of money for physicians, drugs, nursing and medicines in endeavoring to be cured of his injuries to-wit, the sum of $200 and that he lost two horses of the value of $200, and a cart and harness of the value of $50 and that he has otherwise been injured and damaged to the sum of $5,000, and therefore he brings suit.

Dated the 17th day of November, 1911.

Silas B. Spier,
Franklin P. Monfort,
Attorneys for Plaintiff.

Fred L. Vandeveer,
Counsel.

Filed November 18, 1911. Martin J. Cavanaugh, Clerk.

ORDER ON COMMENCEMENT OF TRIAL BY JURY AND MEMORANDUM OF ADJOURNED TRIAL DAYS.

At a session of the Circuit Court of the United States for the Eastern District of Michigan, continued and held pursuant to adjournment at the District Court room in the City of Detroit, in said district, on Saturday the ninth day of December in the year of our Lord one thousand nine hundred and eleven.

Present: The Honorable Alexis C. Angell, District Judge.

John W. Parrott

vs.

Metzger Motor Car Company.

The parties to this cause being in court by their respective attorneys ready for trial, thereupon comes a jury, viz. Perry Townsend, Jacob Frinkle, Philip O'Hara, George W. Wilson,

Birney G. Kanhause, Fred C. Teidt, Daniel W. Rose, Albert D. Engilsh, Wirt Cornwell, James Lane, D. E. Chestnut and Henry Herriff, good and lawful men who being duly impaneled, tried and sworn, sit together and hear a portion of the evidence in the case.

Alexis C. Angell,
District Judge.

Note: And thereafter said cause proceeded to trial by jury on the following enumerated days: Monday, December 11th, 1911; Tuesday, December 12th, 1911, and Wednesday, December 13th, 1911.

PLAINTIFF'S REQUEST TO CHARGE.

STATE OF MICHIGAN.
THE CIRCUIT COURT FOR THE COUNTY OF MACOMB.

No. 7254. Transferred to United States District Court as Number 8729 Eastern District Southern Division.

John W. Parrott,
Plaintiff.

vs.

Metzgar Motor Car Company, a corporation, etc.,
Defendant.

1. It is the claim of the plaintiff that on the night of the 12th of July 1910, while he was driving on the public highway known as the Gratiot road, running from the City of Detroit to the City of Mt. Clemens, that he was run into and greatly injured by an automobile owned by the defendant Metzgar Motor Car Company.

2. It appears from the evidence that the Gratiot Road is a public highway much used for travel and that the electric cars of the Rapid Railway use the easterly side of the said highway.

3. Under the law the plaintiff John W. Parrott was lawfully traveling upon said highway as appears from the evidence, driving a one horse cart and with the assistance of his companion Thomas Barry leading two horses. This was in the night time and under the law he was not required to carry a light or lantern.

4. Under the law of the State of Michigan it was the duty of the defendant while traveling said highway in the night time to display at least two lighted lamps on the front of their motor vehicle, so lighted that the light therefrom would be visible a least two hundred feet in the direction in which it was going. It was also the legal duty of said defendant to have then and there so operated said automobile along said highway as not to endanger life or limb or property of any person who is traveling along said highway in a prudent and reasonable manner.

5. It was also the legal duty of said defendant to then and there slow down the speed of said automobile when approaching the horses and cart of said plaintiff that it might stop said automobile before it struck the horses or rig of the said plaintiff.

6. It was also the duty of the said defendant to so operate said automobile as not to do injury to said plaintiff while he was traveling along the highway in a reasonable and proper manner.

7. It was also the duty of said defendant to not operate said automobile at a rate of speed exceeding ten miles an hour when it was then and there approaching the rig of said defendant, and if it wished to pass said defendant to give him due and proper warning and opportunity therefor according to the laws of the road.

8. If you find from the evidence that while the plaintiff was driving his rig along said public highway and while he was exercising due proper and ordinary care that the automobile of the said defendant ran to and upon or against him and thereby injured him, then the plaintiff is entitled to recover such damages not exceeding the sum of five thousand dollars as appears from the proofs that he has suffered.

9. It appears from the evidence that the defendant the Metzger Motor Car Company was the owner of the automobile at the time of the injury complained of. Under the laws of the state of Michigan the owner of an automobile is liable for the negligent injuries done by it although it may be operated by some person other than the owner thereof.

10. Determining the damages to be awarded plaintiff you should allow him a fair compensation for the injuries done to his two horses and for the injuries done to his cart and harness and for his personal injuries. Also for the expense of his nurse, physician and for the loss of his time, pain and bodily suffering and such further sum for permanent injury

as you are satisfied from the proofs that he may be entitled to receive; such damages in all not to exceed the sum of five thousand dollars.

Silas B. Spier,
Attorney for Plaintiff.

Filed December 13, 1911. M. J. Cavanaugh, Clerk.

DEFENDANT'S REQUESTS TO CHARGE.

UNITED STATES OF AMERICA.
IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

No. 8729.

John W. Parrott,
Plaintiff,

vs.

Metzger Motor Car Company, a Corporation,
Defendant.

1. Under the pleadings and proofs the plaintiff cannot recover and your verdict must be for the defendant, no cause of action.

2. I charge you as a matter of law that under the common law the plaintiff is not entitled to recover against the defendant in this case, inasmuch as there is no showing that the automobile which caused the accident for which suit has been brought was being used by the driver or drivers of the same on the business of the defendant company.

3. I charge you that it appears from the undisputed evidence in this case that the person or persons who were operating the car which caused the accident were not operating or using said car for the business or in the interests of the defendant company.

4. I charge you as a matter of law that there is no testimony in the case that there was any permission granted to the driver of the car in question to use the same for any purpose whatsoever or that, while operating the same, he was doing so with the consent of the defendant company.

5. I charge you as a matter of law that if plaintiff could recover at all in this case it would be by virtue of subd. 3 of

Sec. 10 of Act No. 318 of the Public Acts of 1909 of the State of Michigan, entitled, "An Act providing for the registration, identification and regulation of motor vehicles operated upon the public highways of this state and of the operators of such vehicles."

6. I charge you as a matter of law that subd. 3 of Section 10 of Act No. 318 of the Public Acts of 1909 of the State of Michigan is in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

7. I charge you as a matter of law that subd. 3 of Section 10 of Act No. 318 of the Public Acts of 1909 of the State of Michigan is unconstitutional, for the reason that it abridges the privileges and immunities of citizens of the United State and of this defendant, and further that it deprives the defendant of property without due process of law, and also that it denies it the equal protection of the laws.

8. I charge you that there is no evidence in the case from which you can find that the plaintiff has sustained any permanent injury.

Brennan, Donnelly & Van De Mark,
Attorneys for Defendant.

Filed December 13, 1911. Martin J. Cavanaugh, Clerk.

VERDICT FOR PLAINTIFF.

At a session of the Circuit Court of the United States for the Eastern District of Michigan, continued and held pursuant to adjournment at the District Court room in the City of Detroit in said district on Wednesday the thirteenth day of December in the year of our Lord one thousand nine hundred and eleven.

Present: The Honorable Alexis C. Angell, District Judge.

John W. Parrott

vs.

Metzger Motor Car Company.

No. 8729.

The jurors heretofore empanelled and sworn in this cause come in to court and sit together and hear the conclusion of the evidence and the arguments of counsel, and after hear-

ing the charge of the court retire under the charge of officers duly sworn for that purpose, and consider of their verdict to be given, and after being absent for a time, return into court and say upon their oath, that the said defendant is guilty of the charge as alleged in plaintiff's declaration, and assess the damage of the said plaintiff, on account of the premises, at the sum of $1843.00.

Alexis C. Angell,
District Judge.

ORDER EXTENDING TIME TO SETTLE BILL OF EXCEPTIONS.

At a session of the District Court of the United States for the Eastern District of Michigan, continued and held pursuant to adjournment at the District Court room in the City of Detroit, in said district, on Saturday the Second day of March in the year of our Lord one thousand nine hundred and twelve.

Present: The Honorable Alexis C. Angell, District Judge.

John W. Parrott

vs.

Metzger Motor Car Company.

In this cause upon the application of defendant's attorneys for an extension of time within which to settle bill of exceptions herein, plaintiff's attorney appearing and not opposing, it is by the court now here ordered that the tme to settle and file bill of exceptions herein be, and the same is, hereby extended for the period of sixty days from and after the fourth day of March, 1912.

Alexis C. Angell,
District Judge.

BILL OF EXCEPTIONS.

UNITED STATES OF AMERICA.
IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

No. 8729.

John W. Parrott,

Plaintiff,

vs.

Metzger Motor Car Company, a New York Corporation,

Defendant.

Be it remembered, That afterward, to-wit, on the 9th, 11th, 12th and 13th days of December, in the year of our Lord one thousand nine hundred and eleven, at a stated term of said court begun and holden in the City of Detroit in and for the Eastern District of Michigan, before the Hon. Alexis C. Angell, District Judge, the issue joined in the above stated cause between the said parties came on to be tried before the said judge and a jury; the plaintiff being represented by Silas B. Spier, Esq., his attorney, and Fred L. Vandeveer, Esq., of counsel; and the defendant by Henry L. Lyster, Esq., and Frank M. Brennan, Esq., of the firm of Brennan, Donnelly & Van De Mark, its attorneys; and upon the trial of that issue the attorneys of the said John W. Parrott, plaintiff, to maintain and prove the said issues on his part produced the following witnesses, who were duly sworn and testified as follows:

The first witness called was

THOMAS BARRY,

who after being duly sworn on behalf of the plaintiff, testified as follows:

I will be forty-seven years old this coming March. I live in Mt. Clemens and have lived there most of my life. I was with the plaintiff when he was injured July 12th, 1910. I have known plaintiff probably thirty-five years. We came to Detroit that day to buy some horses. I bought a horse and Mr. Parrott

bought two horses. We walked most of the way home from where we bought the horses, out about ten miles, I should judge, on the Gratiot road. There we stopped, went in and borrowed a cart and harness. We were to pay $12 for the cart or return it. One of the horses was hitched to the cart, the other hitched to the thill alongside, and one was led. My horse was led behind. Plaintiff drove the horses. The horse tied to the shaft was tied to the right hand side of the shaft.

The plaintiff lives at Mt. Clemens. His little boy was with us. He is eight or nine years old. I was on the right hand side of the cart and the boy sat on the footboard down between our feet. The accident happened between twelve and one o'clock at night. It occurred about two and a quarter miles this side of Mt. Clemens. The town of Clinton is in Macomb County. The gravel part of the road there is about seventeen or eighteen feet, I should judge. Upon our way up that night we saw several automobiles. We were driving one horse in the shafts, the other tied alongside of the shaft on the right hand side, and leading a horse behind. I did not have any particular trouble in leading the horse. It was a young horse, and in meeting an auto I would have to get out to keep him away from it when it came up behind.

I looked around and I saw there was no headlight. The auto came up and we noticed it was coming pretty fast and was going to strike us. I threw up my hand and hollered, and he hollered at the same time, and it struck in behind and broke the cart; turned the cart end for end; broke the shaft and wheels; broke the cart all to pieces; turned it right around; threw me up in the air I don't know how high, and I fell on the back of my head, and when I got up I saw Mr. Parrott laying there in the road, and some one in the auto, and some one working over him; and I got up and said, "Are you hurt?" and he said "Yes, I am hurt pretty bad."

The Rapid Railway car was coming down and they flagged the track. After the accident the rear of the cart was about where the head of the horses would be, and the right wheel pretty close to the track—the front wheel. The auto stood kind of kittering in the road, headed towards Mt. Clemens. When the electric car stopped the two Schultis boys got off. I discovered that the plaintiff was pretty badly hurt and everything was all broke up. I guess some of the people got aboard of this car. He was all bruised up and battered, and not able to do anything, and he wanted to get the number of the car. The horses were pretty badly cut up—one of them so he could hardly get home.

The automobile before it struck us did not whistle or signal its approach to us. The main headlights were not lit. I could not say as to the oil lamps on the side; I didn't notice them in particular. It was dark and I think they used one of the lights off their auto to signal the car. We did not have a lantern.

After the accident I visited the office of the defendant company, the Metzger Motor Car Company, in Detroit. I saw Mr. Everitt, the general manager of the Metzger Motor Car Company. He came out and wanted to know what my business was, and I told him in regard to the accident. I went there and called, and there was a lady in the office. And there was a man came in—I forget his name—the superintendent up there. I called for Mr. Everitt and this lady said he couldn't see me until such a time, about half-past eleven, and I came out and met a man and I says, "Are you Mr. Everitt?" and he says, "I will answer the purpose, what is it you want?" And I told him, and he said—

Mr. Brennan:

Did he say he was Mr. Everitt? A. He didn't say he was, and he didn't say he was not; he said he would answer the purpose.

Mr. Brennan:

I object to any conversation with this man, unless it is shown he had authority to make a statement binding the company.

(Witness continuing): He told me to take the auto; called one of the drivers; and go down here and see some lawyer I think it was in the Ford Building, by the name of Cotter, and they would fix it up. (Objected to as incompetent, irrelevant and immaterial; exception noted.) (Witness continuing): The gentleman who met me in the office was the same one that sent me down in the auto. I told him I wanted to see him in regard to that accident we had Monday night, and wanted to know what they would do about it. I supposed this gentleman was Mr. Everitt, but I don't know the man's name. I couldn't swear it was Mr. Everitt.

CROSS EXAMINATION

By Mr. Brennan:

We came to Detroit in the morning; bought the horses sometime after dinner, about noon; bought them at Forest Avenue and Fourteenth, on the west side of the city; walked them across the city until we bought the buggy.

This accident happened between twelve o'clock and one o'clock at night. Our attention was attracted by the sound of the automobile. We heard the machine coming behind us. I turned and saw they had no headlight. I don't know whether they had other lights. I spoke of flagging the car with the lights of the automobile—I thought it was one of the lights of the automobile. The night was cloudy; it rained before we got home. We could see to drive and get along the road. We stopped in some of the road houses on our way home.

JOHN W. PARROTT

after being duly sworn on his own behalf, testified as follows:

EXAMINED

By Mr. Spier:

I am the plaintiff in the case. I was born May 27th, 1855. Lived in Mt. Clemens forty-seven years. Am married and have children.

While driving towards Mt. Clemens that night, the first I knew or heard of the automobile was when I heard a noise, and I kind of turned around and I made a noise, and it was right there and struck us at the same time, it came on so quick. I was knocked insensible.

Mr. Brennan:

Mr. Everitt has been subpoenaed by the plaintiff and is anxious to get away, because he is going to New York. He called us up saying he had been subpoenaed, and wanted to know if his attendance was essential; I told him he had better come over, and I wish, if counsel is going to use him, they would put him on now.

Mr. Vandeveer:

I would like to have a conference with Judge Spier before we do put him on. We will excuse Mr. Everitt from the subpoena.

Mr. Brennan:

It may seem a little bit out of order, but may I put Mr. Everitt on at this time, as it is the only opportunity I shall have, as he is about to leave the city?

Mr. Vandeveer:

I object to that. We subpoenaed him, he is here, and we do not call him to the stand as a witness, and we have excused him from the subpoena. That is all.

Mr. Brennan:

I understand you are not going to put him on?

Mr. Vandeveer:

Not at this time; we may later.

Mr. Brennan:

Do you expect to keep Mr. Everitt in the city?

Mr. Spier:

I object to this; we are now putting in our proof, and I object to counsel's interrupting. We have a right to subpoena any person and pursue our own order of examination. He calls on us now to say whether we will hold this witness, and we object—

Court:

But the question is, as I understood, Mr. Brennan would like to make Mr. Everitt his own witness, and he asks a favor of you to call him now, as he is about leaving the city, out of order, and you decline to grant that favor. Do I understand correctly?

Mr. Spier:

At this time.

Court:

Well, I can't compel you to do it, if you don't want to.

Mr. Brennan:

I have consented to Judge Spier departing from his order of proof, and withdrawing the plaintiff to accommodate him. There are one or two questions that I think I would like to ask Mr. Everitt.

Court:

I quite appreciate that, but I can not insist that plaintiff's counsel suspend, unless he sees fit to do so, in order that you may put on a witness out of order.

Mr. Brennan:

Exception.

JOHN MATTHEWS,

a witness, sworn on behalf of the plaintiff, testified as follows:

EXAMINED

By Mr. Spier:

I am a citizen of Mt. Clemens and am under-sheriff of Macomb County. My attention was first called to Mr. Parrott's accident the morning after, that is, on July 13th. The matter was reported to the sheriff's office and the sheriff ordered to go and make an investigation. He had some numbers of machines given to him by one of the police officers, and he gave the numbers to me, and he wanted me to go down here and see who owned the

machine, and who the people were that were in the machine. I came down to Detroit, went over to police headquarters, and a detective was assigned to me to look up these numbers. We looked up one of these numbers under the name of the Metzger Motor Car Company. We went out to the factory, and after arriving at the factory we inquired for the manager, and were brought into Mr. Everitt's private office. We told him we came there to find out if there had been any report to him that one of his machines was in an accident the night before, and Mr. Everitt said his attention had been called to the matter. We asked him if we could interview the parties who were in the machine—driving the machine. He said we could, and he sent his office boy down after the men, and they came up, and we asked them if they were in the machine; obtained the names of the parties that were in the machine, and asked the man who drove the machine in reference to the speed they were going and whether they had headlights or not. I was talking to a Mr. Smith and a Mr. Colter. It took place in Mr. Everitt's private office. Mr. Everitt, Mr. Lamb, myself, Mr. Smith and Mr. Colter were there. Mr. Lamb was a police officer.

Mr. Brennan:

Mr. Colter has died since this suit was started and I want to object to any statements he may have made. (Objection overruled; exception for the defendant.)

(Continuing) I asked Mr. Colter and Mr. Smith, after they came in, if they were the gentlemen in the machine the night before, and they said they were. Of course, we went on to ask them in reference to their headlights, and they told me their headlights—something was done to them; they were not burning, but the oil lights on the side were burning, but the headlights were not burning.

HENRY N. SCHULTZ,

a witness sworn on behalf of the plaintiff, testified as follows:

EXAMINED

By Mr. Spier:

I am a motorman of the Rapid Railway. My car was flagged on the night of July 12th, 1910. The automobile stood crosswise on the track. We stopped and helped

get the automobile off the track. I took the number of the automobile. It was number 5106. I saw an oil lamp burning on the automobile and they had one off the automobile to flag the car with.

AUGUST SCHUNEMAN, GERTRUDE PARROTT, JOHN BARTLEY, DR. A. N. LANFESTY AND DR. ALFRED GRAHAM

were also sworn as witnesses on behalf of the plaintiff and testified as to plaintiff's injuries, his present physical condition, and the condition of his business; the testimony tending to show that plaintiff had suffered pain from his physical injuries and that he had never entirely recovered and was not in as good condition at the time of the trial as he was prior to the accident, and that his business had suffered as a result of his injuries.

Plaintiff rests.

CHARLES GORDON,

a witness sworn on behalf of the defendant, testified as follows:

EXAMINED

By Mr. Brennan:

I am works manager for the Metzger Motor Car Company. That was my business on the 11th and 12th days of July, 1910. I knew Colter very well. Smith, I am not sure whether I know him or not. We had a number of Smiths. Mr. Colter was a tester and chauffeur.

The rule of the Metzger Motor Car Company on the 11th and 12th days of July, 1910, and prior thereto, with reference to any one taking a car from the Metzger Motor Car Company, was as follows: "The watchman was not allowed to pass any one with a car outside of the regular testers during the regular working hours, except when they would show a written pass signed by myself." That authority was given me very soon after we went into that plant by Mr. Everitt, and is still in existence. I am not sure whether this rule was written or not, but I am sure that I personally instructed the watchman not to allow any one to go out without a pass. That rule still stands.

I did not issue any pass to Garfield Colter on the 11th day of July, 1910, to take a car from the Metzger Motor Car Company. I learned that the car had been taken out the day after the accident. I saw the car, talked with the man who took the car and drove it, and he mentioned he had met with an accident. Mr. Colter has died since the accident.

CROSS EXAMINATION

By Mr. Spier:

As a rule, Mr. Colter was called upon by Mr. Everitt to act as his chauffeur. Mr. Everitt said that he preferred to have him drive as he had known him a long while. He had been employed there about two years, and up to the time of this accident was considered one of our responsible and reliable testers and chauffeurs.

He could not take a car out of there without getting an order from us. If Mr. Everitt wanted to come down town, and called on this man to take him down, he did not have to get an order from me.

Court:

The witness' answer was "during regular working hours." It was during outside hours that this rule obtained.

Mr. Everitt, as a rule, drove his own car. I am not sure whether the order that I testified to was written, but I believe it was. I will look it up and produce it if there is such a written order.

Recess.

(Continuing) During recess I examined our records and found that there was a written order. I have it with me. It is a confirming letter of verbal instructions previously received. I had had a talk with Mr. Everitt some months previous and then he wrote this letter at my request.

Q. Now, on the 12th day of July, 1910, have you any memorandum or anything that shows the work you were doing that day?

Mr. Brennan:

This date is confined, I understand it, to the 11th. This accident happened, according to your testimony, on the morning of the 12th.

Mr. Spier:

I submit I am not confined to a minute in testing the witness' memory.

Court:
He may answer.

(Continuing) I have no special recollection of anything that I did on the 12th day of July, 1910. I have no record of the permits given on that day. I do not recollect whether I was there all day on the 12th or not. At that time there was no one authorized to take my place if I was absent from the factory. The business of the Metzger Motor Company did not stop if I went away, and if any one wanted to go out with the machine, if I was absent, they would have to go to an official with more authority than I had—one of the officials of the company. Any official of the company would have authority to let a machine go out. I am works manager. Those who could give permits to let automobiles out were the President and General Managar, Mr. Everitt, and the Secretary and Treasurer, Mr. Metzger and Mr. Kelly.

During the day we have a gateman, but at night the gates are locked. It was against the rules for automobiles to go out in the day and remain over night. We do not permit it if we can prevent it. We can not always prevent it in the natural course of business. At the time of the accident we had probably ten testers. A chauffeur was also a tester and was counted as one of the testers.

On the 12th of July, 1910, during the day, a man by the name of Fancony was gate keeper. I have not talked with him about this. He is still living; still in the employ of the company. He does not keep a record of the people that go out, except the testers during the day time when he is on duty. I don't know that he keeps that record, but he turns in the report to the foreman of that department. When a tester goes out to test a machine he keeps track of him to see how long he is gone, and the duty of the tester is to go out and test the machine and work the machine out. He has not general liberty and discretion to take the course he sees fit. If he wanted to run to Mt. Clemens and test out, he would have to get permission of the foreman of the road testers. At the time of the accident I think this foreman's name was Helwig.

Q. Will you swear that Colter did not have a permit from the head of the testers to go out with the machine on the 12th of July, 1910, of your own knowledge? A. I know nothing concerning the tester.

Q. Will you swear of your own knowledge that he did not have that permit from the tester? A. No, sir, I will not. I don't know anything about this.

Q. Or any officer? A. He did not have a testing car.

Q. That is argumentative. The chief tester and any officer of the company might have given him a permit to go out, couldn't they, for pleasure riding? A. Certainly.

Q. Who was Williams at Battle Creek, that was in the car that night? A. I don't know the gentleman at all.

Q. You do not know him. A. I might know him, but I do not know him by that name.

Court:

I shall not allow a recovery here, apart from the statute, unless you show, not only that he had the right to take this car, but at the time of the accident he was doing something in the line of his duty for the company. I do not know whether that will help you any to have me intimate that now. The point I make is this, that the mere fact—if it were a fact—that Colter had permission to take the car—not a testing car, but a touring car that is in evidence here—would not make the company in any sense liable if mishaps happened to him while on the road to Mt. Clemens with his friends unless it was on company business. If you have any authorities, I will be glad to hear you.

Mr. Vandeveer:

In this case Judge Spier is relying upon a recovery in this case upon the Michigan statute of 1909, which says that the owner of the automobile which causes an accident was liable in damages for the injuries that are occasioned by the operation of the same, with one exception, and that provision is unless the same is stolen. Do I understand from the court's attitude, that you are going to declare, unless we can show that the automobile was being used and operated on behalf of the defendant, and in the progress and interest of their business, that we cannot recover.

Court:

I say, apart from the statute.

Mr. Vandeveer:

May I ask this question of the court very frankly, is the court going to hold that under the showing we have made, that that being the owner's car, there is a jury question involved in this case?

Court:

I am not clear about that as yet, but of course there is, if the statute is constitutional.

(Witness continuing): I don't know of my own knowledge whether Fred Smith, who works in the paint shop, or Mr. Hill, of Battle Creek, were with Coulter the night of the acci-

dent. Smith is not employed by the Metzger Motor Car Company and I don't think he ever has been. While he works there, he is not working for that company, but for a paint contractor who has since died. He is at the present time working for the paint contractor who took that work from the other man.

No one had special charge of the date the night of the 12th or 13th. The key was in the time-keeper's office. We have three watchmen at night, and each watchman had access to that date to let any on in or out, according to where they were in the building. I have the names of the three watchmen who had charge on the night of the accident, July 11th, which I got from the records in the time-keeper's office. These same ones were on watch the night of the 12th. They are not required to keep any record of what machines go in or out. I believe I saw this automobile, but I am not sure. We have wrecked machines coming in at all times during the night, smashed up by accident. I don't remember the number of this machine. I don't remember anything about what damage was done.

RE-DIRECT EXAMINATION

By Mr. Brennan:

Letter dated November 16th, 1909, to the Metzger Motor Car Company, marked Exhibit "A" and received in evidence without objection.

In the course of my investigation as to who had taken this car, I found out that it was a factory car of the Metzger Motor Car Company that had been taken out. The custom was, that if a man was to take a factory car out, I was the one to issue an order for it, and if that car were to go out in the evening, the man who had the permit would have to present it to one of the watchmen at the gates. In the day time the testers were accustomed to take cars out. The rule was, that the car that was sent out on company business should be returned direct to the factory. The time was very indefinite, because the factory necessitated working at the express offices often after regular hours. An employe would be discharged for taking a car out of the regular testing route, or off the shortest route for company business.

I remember hearing of this accident. I think the day previous to the accident I was at the Metzger Motor Car Company. If anybody else issued an order to Mr. Colter to take that car out, the order would be taken up by the watchman at the date at night, if he went out.

RE-CROSS EXAMINATION

By Mr. Spier:

Q. Can you swear none of them went out of the factory without an order during the day of the 12th or the 11th? A. No, I can't swear they didn't go out. I heard there was some one else with Colter in the car that night. I don't know who they were. I found out about this accident from Mr. Colter. I have seen this automobile. It is a touring car; weighs about 2800 or 3000 pounds; thirty horse-power, five passenger. This machine was kept at the factory for Mr. Everitt's use—for his work in connection with the company. Mr. Colter was not Mr. Everitt's private chauffeur, but preferred Colter when he took the car out on company business. He was the chauffeur that Mr. Everitt called upon if he was there. Mr. Colter would not have to have a pass if he went through the gate with Mr. Everitt. I have known of his going out without a pass with that car frequently, but he could not take the car out on the 11th or 12th whenever he had a mind to without getting an order from me. He did not have to get an order from me every time he went, but he had to have an order from either the party the car was supposed to belong to, or myself. If Mr. Everitt, the president, told him to go and take the car and go somewhere on an errand, Colter would not have to get a permit from me.

RE-DIRECT EXAMINATION

By Mr. Brennan:

I recall the occasion of Mr. Everitt being taken down to the depot by Mr. Coulter to take a train the day before this accident. Mr. Everitt took Coulter to have him drive him to the train and bring his car back to the factory.

He did not bring his car back to the factory. I next heard of the accident the day of the accident. I had some conversation with Coulter with reference to the accident. I reprimanded Coulter for taking this car out upon the evening in question.

RE-CROSS EXAMINATION

By Mr. Spier:

Mr. Everitt and Coulter took the automobile from in front of the office building outside of the yard on the street. It was customary to leave the cars there. It was next to the curb. I did not give him a pass or check to go out on that trip. The car was out there in front of the building on the street where it was usually kept. Mr. Everitt told me he was going to the

train. I did not see him get into the automobile. He told me to get Coulter for him and I found Coulter and instructed him to take Mr. Everitt to the train. I told him that Mr. Everitt wanted him to take him to the train.

Afterwards Mr. Coulter told me what he had done with Mr. Everitt. I know he took Mr. Everitt to the train. I did not see Mr. Everitt take the train, but I know that Coulter said that he took him to the train. I did not see Mr. Coulter again until the next day after that.

Q. And the accident happened that night? A. Between the time I instructed him to take him to the train and the time—

Q. Wait a moment. From the time you told Mr. Everitt wanted him, you didn't see Mr. Coulter from that time until after the accident, as you understood the accident took place from Mr. Coulter? A. No, sir. After I told Coulter that Mr. Everitt wanted him to take him to the train, I probably did not leave the factory for two or three hours. I do not know the exact time, but I was working every night at that time. It was probably seven or eight o'clock. I have no particular recollection as to how late I worked that time. I was very seldom called away on business, but I am sometimes. I would swear that I was not called away on the night of the 11th, 12th or 13th of July, 1910.

Q. What fixes that in your mind? A. The fact I was there to give those instructions and that I reprimanded Mr. Coulter the next day for taking the car away.

Q. When did you next see Mr. Everitt after that? A. I don't remember how many days it was.

Q. Will you swear Mr. Coulter did not come back to the office or factory that night after he went away with Mr. Everitt? A. I can't swear that. I was not there all night. I believe I have seen Mr. Barry before, but I cannot place him. I did not say that Coulter took him down town in an automobile when he was there the day after the accident. I don't know whether he had a pass then or not.

RE-DIRECT EXAMINATION

By Mr. Brennan:

Q. Was there anything further said as to what should be done with the car? A. I told him to take Mr. Everitt to the train, and be careful with the car, and get it right back.

Q. If that machine was not brought back during the time you were there, and suppose it was brought back, say, at nine o'clock and taken inside, could it have been gotten out without

a pass to get by the gateman? (Objected to; overruled; exception for plaintiff.) A. No, sir, he could not; if he didn't have a pass it would not be allowed out.

THOMAS SMITH

a witness sworn on behalf of the defendant, testified as follows:

EXAMINED

By Mr. Brennan:

I am a watchman and was watchman for the Metzger Motor Car Company during the month of July, 1910. I left that company on the 4th of February last winter. I knew a lot of testers, but I don't know how this man Coulter looked. I don't know the name. During the month of July I was watching back in the yard. I have never been a watchman at the gates. The front gate was a different watchman. On nights there was a man named Jim, but I don't know his last name; there was a different man too over there; he was a man whose first and last name I have forgotten. A man by the name of Hoffman watched the building. He didn't watch the gates. He pulled the still alarm boxes, and he had to punch the boxes at the front of the gate every half hour; he was at the front gate too. If the tester wanted to take the car out he has to show a pass to the watchman at the front gate. He would get the pass from the office from Mr. Gordon. If a man came to the gate without a pass, the watchman stopped him, and he was supposed to go back. If he came to the gate and didn't have a pass, I would stop him.

CROSS EXAMINATION

By Mr. Vandeveer:

Mr. Everitt had a car up there. When his car went out it did not have a pass. People working in the office don't have to have a pass. They don't need it.

GEORGE W. HOFMEIER,

a witness sworn on behalf of the defendant, testified as follows:

EXAMINED

By Mr. Brennan:

I am a decorator. I was employed by the Metzger Motor Car Company the month of July, 1910. I was general watchman over the main building. I was not the regular man at the gates in the month of July. My instructions were that no one

could go out of the plant at night with a car without a pass. He would have to get a pass either from Mr. Everitt, Mr. Metzger or Mr. Gordon—one of the officers.

Q. If a man came to you, while you were on the gates, without a pass, state whether or not you yould allow him to go out.

Mr. Spier:

In view of the testimony as to the circumstances, of the witness, that this car was out in front, and Mr. Everitt took it away with the chauffeur and came to the station, all this other testimony is immaterial as to customs and usages.

Mr. Brennan:

Very well. If Judge Spier will concede this car Mr. Coulter took Mr. Everitt to the station with, was not returned, that will obviate the necessity of putting in the proof.

Mr. Spier:

I don't need to concede; he has got to either take one theory or the other.

The Court:

Do you concede what Mr. Brennan seeks to prove?

Mr. Spier:

No, I could not, your Honor.

The Court:

Then the question may be answered.

Q. If you were on the gate, and a man came to you, without a pass, state whether or not you would allow that man to take that car out of the factory. A. No, sir.

CROSS EXAMINATION

By Mr. Vandeveer:

There was one gate at this plant where you could get access or exit from. It is hard to tell where I was on the night of the 12th of November, 1910. I might have been on the top floor or at the gate.

Q. So you can't state as to whether or not a car was taken out of the door that night, of your own personal recollection? A. If there was a car taken out I would know it, whether I was at the gate or not.

Q. Can you state whether or not a car was taken out there that night? A. Not while I was on duty.

Q. At the time you were on duty, can you swear whether or not a car was taken out that night? A. No.

Q. Because that would not be within your personal knowledge? A. No, sir.

Q. When you speak of passes, the man who takes the test cars on the road, that is, to give them their test—those men, during the day time, carry passes so that you can keep track of the cars and who takes them out? A. They don't need a pass in the day time?

Q. Mr. Everitt had a car for his own personal use at the factory, did he not, which was left on the outside? A. Well, it wasn't left outside as a general rule.

Q. Was it outside occasionally, at the curb? A. It would be outside if it was to be left there for only a few minutes.

Mr. Everitt very seldom worked at night. I have known him to be there in the evening. He would sometimes be there as late as eight o'clock. If he wanted a car at that time he would not have to have a pass himself, but the person driving him around would have to have a pass if he went out alone.

Q. That is, if Mr. Everitt was in the office and he had the same driver, and he told him to get his car, would he have to have a pass? A. Yes, sir, he would have to have a pass to get out. We haven't any of those passes; we don't keep them. We turn them in at the office in the morning. They would be put in the timekeeper's office; he would have them. There were several timekeepers. The timekeeper would take them up to the paymaster's office. I don't know whether his records would show as to whether or not an order had been granted. Sometimes a sales agent would come out to the plant to go through the plant. We had cars there that would be used in demonstrating and taking them around the city. I couldn't tell anything about the number. They would use different cars at different times. We have had conventions out there. Sometimes the company furnishes automobiles for them to ride around in; also for the purpose of demonstrating and testing the cars at that time.

RE-DIRECT EXAMINATION

By Mr. Brennan:

There was a watchman out there in the month of July by the name of James W. Yates—I think he was there at that time.

ALONZO THAYER

a witness sworn in behalf of the defendant, testified as follows:

EXAMINED

By Mr. Brennan:

I am a member of the Sadler Detective Agency. I attempted to subpoena a witness named James W. Yates. I was unable to find him in the city, and after making a search at the previous address where he lived, through the instructions I received from other men who worked with him, I was unable to find him. I inquired for him at 177 Sproat Street in this city. He had lived there, and the last they heard of him was that he was in St. Louis, Missouri. He left there some time in February, and his wife followed him in May.

HENRY C. BARTER

a witness sworn in behalf of the defendant, testified as follows:

EXAMINED

By Mr. Brennan:

I am record clerk of the Board of Health and have charge of the records of deaths. I have the original record of death of Garfield Coulter of the City of Detroit. This volume that I have here is the official record kept by the City of Detroit of vital statistics. He died August 7th, 1911.

Record offered in evidence and accepted.

"Garfield Coulter died at Harper Hospital on August 7th. Dr. Allen attended him from July 30th, 1911, to August 7th, 1911, and he died at 6:30 August 7th. Cause of death was perforated wound of liver, auto accident. Dr. M. Allen."

CROSS EXAMINATION

By Mr. Vandeveer:

It does not state where the accident occurred, nor where deceased was employed at the time he received his injury. It just states that he was an automobile tester. It does not state the circumstances under which he received his injury.

Mr. Vandeveer:

We offer in evidence the statutory table of mortality found in the compiled laws.

Mr. Brennan:

I object to that for the reason there is no evidence in this case that the plaintiff has sustained any permanent injuries, and the tables are admissable only where there is permanent disability.

The Court:

I don't think it is a very serious matter whether it goes in or not. I will let it in and you may have the exception. (Exception for the defendant.)

Mr. Brennan:

I would like to make a motion to the effect that a verdict be directed in this action for no cause of action, for the defendant, for the reason that, under the showing in this case, there has been nothing for which the defendant could be found guilty of negligence at common law. Secondly: That the statute which is invoked in this proceeding is unconstitutional, for the reason that it is in conflict with the fourteenth amendment to the Constitution. The statute here involved is Act 318 of the Public Acts of 1909, section 10, sub-section 3, liability of owners. (Motion denied; exception for defendant.)

Recess.

The Court:

In reference to the motion made this morning on the part of the defendant, after some consideration, while I have very grave doubts as to the validity of this act, I am inclined on the whole to say that it is not so absolutely clear to me that it is invalid, and I hardly feel that I ought to direct a verdict by reason of the invalidity of the act. Taken in connection with Act No. 33, it presents a very difficult question, both the interpretation of the acts so as to make them harmonize, and the constitutionality or validity; but on the whole, I hardly think I ought to grant the motion. The motion is denied. I trust my ruling will be reviewed by the higher court.

Mr. Vandeveer:

At this time I desire to offer in evidence—I don't think it has been done before—the probable duration of the plaintiff's life and expectancy.

CHARGE OF THE COURT.

Gentlemen of the Jury: This is an action brought by John W. Parrott, as you know, aganst the Metzger Motor Car Company to recover for damages which he claims he received in July, 1910, through a collision of a car owned by that com-

pany with a wagon or cart. I take it the facts are so simple that you remember them perfectly well. The essentials of them are, of course, as follows: That Mr. Barry, Mr. Parrott, and Mr. Parrott's boy were driving towards Mt. Clemens some time after midnight in a cart, with one horse in the shafts, and one tied fast alongside the shafts, and one led behind. When they got to a certain point, which they fix reasonably well, they heard the noise of an approaching machine, an automobile, coming behind them, and both of them apparently turned around to shout, and before they got through shouting, the horse, at least the one being led, was struck by the machine. The motor car was stopped before it had gone very far—how far I leave to you to say, and fetched up with its right forward wheel close to the track of the Rapid Railway, and the cart was off somewhere the other side of the road, and Mr. Parrott was thrown out. The automobile, there is no dispute, was owned by the defendant, the Metzger Motor Car Company.

You have heard some discussion here about the law. It is perfectly apparent to all of us what the man driving the car was doing. He was taking his friends out to drive, some of them, and that is all there was to it, that part of it. It is also perfectly clear he had no business to be using the car in that way at that time, so far as the company was concerned; he was not on the company's business; he was on his own affairs, and if it were not for the statute we have been talking about, I should direct a verdict at once, on the facts before the court, but I do not feel at liberty to do so because of this statute. It was passed in 1909 and it undertakes, in form at least, to make an owner, either you or me, or a manufacturer, responsible for the damage done by the machine, even if it is driven without any consent of the owner, by somebody who gets it without any right. You have just heard me say I did not feel at liberty, as a judge, to say that law was necessarily and certainly unconstitutional. However you or I may feel about any such law, until some court does set it aside, or the legislature changes it, we have got to administer it, you and I.

Now, I want you to put out of your mind, if you can, all idea of what might have happened, or what the situation might have been, if this law had not been passed, and try to decide this controversy which I shall submit to you, in view of the terms of the statute.

The plaintiff claims that the defendant was to blame in this matter really on the ground or some of the grounds set out in the statute. And before I forget it, and go on to mention

those things which I think are important, I will mention one which, under the statute, not in view of the testimony, is not important, and you may disregard it. The statute provides substantially this, that no person shall operate a motor vehicle upon a public highway at a rate of speed greater than is reasonable and proper, having due regard to the traffic and use of the highway, or so as to endanger the life and limb of any person or the safety of any property; and shall not, in any event, while upon any highway run at a higher rate of speed than twenty-five miles an hour. And further, upon approaching horses being led or driven, it is the duty of the driver of the automobile to slow down to a speed not to exceed ten miles an hour, and give reasonable warning of its approach, and use every reasonable precaution to insure the safety of such animal, etc. Now, the complaint of Mr. Parrott is that these provisions of the statute were not complied with by Mr. Coulter, he being the man driving this car. But it is by no means the question of what is represented to you in the argument, as to the amount of damages Parrott sustained that you are to decide. The question you have to decide is whether the plaintiff, Parrott, has convinced you by a fair preponderance of evidence that some or other of these duties were neglected by Coulter under the circumstances in which he found himself. Now, it is plain enough that the night was not very clear and light. How dark it was is a question for you to determine. It is also plain there was no light on the cart, and it is true that there is no statutory duty resting on a traveler with a horse and wagon to carry a light or lantern, but as comparing the conduct of the man driving the automobile, and the man driving the cart, I think you are entitled to take into consideration the fact there wasn't any light on this cart, and to consider whether, under the circumstances, this man who was driving the machine ought reasonably, sooner than he did, to have discovered the presence of the cart ahead of him. So you see it is by no means a question of your sitting down in your jury room and saying how much damages Parrott has suffered. You may come to that question, of course, but you have first to determine whether he is entitled to any damages under the circumstances of this case. Of course, the burden is on the plaintiff to convince you by a fair preponderance of evidence that these allegations of negligence have been sustained, not necessarily by the number of witnesses, as you know in a civil case, but enough to satisfy your minds that the claims he makes are fairly sustained, and are fairly convincing to you.

On the other hand, the duty rests upon the defendant in this court to convince you that Mr. Parrott himself, in what he did was not guilty of negligence on his part which contributed to the injury. The mere fact, in other words, that this statute is here does not change the whole law of negligence in Michigan, in my opinion, and does not make a mere question of damages out of one of these cases; you have got to find the defendant was negligent, and that the plaintiff himself was free from negligence before a recovery can be had.

Now, you furthermore, as I have said before, have got to determine these questions in the light of the situation as it was presented to the men in question, not as you and I might think about it, sitting here in cold blood, two and a half years afterwards, but as the situation was when the men were confronted with it. Of course, that is obvious sense and good law. Now, under the circumstances of the case, did this man Coulter omit to perform the duty which the statute imposes on a man in his position? Did he operate his vehicle upon the public highway at a rate of speed greater than was reasonable and proper, having due regard to the traffic and the use of the highway, or so as to endanger the life and limb of any person, or the safety of any property. It is in evidence here that at that time of night the highway was used somewhat, but how much the evidence does not show. Of course, we all know it is a main traveled highway out of Detroit. That is a matter of public knowledge, but you may take into consideration the situation in which the the people were between twelve and one o'clock on a summer night. Did he, in view of all the circumstances, handle his machine so as to endanger life and limb, or the safety of any property. Did he got at a speed greater than twenty-five miles an hour? There is no evidence of the speed he was going at, except what you may infer from the testimony of Mr. Barry and the plaintiff. They did not attempt to fix any rate of speed; they simply told you how the thing looked to them, without giving you any data on that subject.

The next suggestion is this: If the man driving at a speed not exceeding ten miles an hour, as soon as he discovered, or ought reasonably to have discovered, there was anything in the road ahead of him which he was about to pass, gave no due and proper warning of his intention, then he did not comply with the statute. If you find he did not do what the statute says he ought to have done, then the plaintiff would be entitled to your verdict. But if you do not so find, then the plaintiff would not be entitled to your verdict. On the other hand, if you are satis-

fied by a preponderance of evidence the plaintiff himself did anything which contributed to the accident, or amounted to an omission to take reasonable care, then he is not entitled to recover. But if you find he did do what a reasonably prudent man under such circumstances ought to do, and if you find that Coulter, the driver of the machine, did not operate his vehicle as he ought to have done in view of the statute, as I have stated it, then you should find for the plaintiff.

On the question of damages, there is a succinct statement of the rule, which I am asked to give you by the plaintiff, and I will give it to you substantially in the words in which I am asked to give it. In determining the damages to be awarded plaintiff, you should allow him a fair compensation for the injuries done to his two horses, and for the injuries done to his cart and harness, and for his personal injuries. Also for the expense of his nurse, physician, and for the loss of his time, pain and bodily suffering, and such further sum for permanent injury, and I will put in the words "if any"; such further sum for permanent injury, if any, as you are satisfied from the proofs that he may be entitled to receive; such damages in all not to exceed the sum of five thousnd dollars. That is the maximum claim of damages. Of course, you could not go beyond that. That is reasonable and clear, and as far as I am able to say, a proper statement of the measure of damages. You have got to use your own sound sense. You have heard this testimony about the value of the horses, and the value of the cart, the medical bills, the loss of his time, and all that sort of thing at considerable length, and as it is wholly a matter for you, I will not attempt to recapitulate it or to state it. The general rule you ought to be governed by is one of compensation, not of punishment—reasonable compensation for such damages along these lines as you find he sustained, if you find, as I have already said, that the defendant in this case ought to compensate him at all. I think that is all.

Mr. Lyster:

The defendant excepts to the refusal of the court to give to the jury its first request to charge, which is as follows: "Under the pleadings and proofs the plaintiff can not recover and your verdict must be for the defendant, no cause of action."

The defendant excepts to the refusal of the court to give to the jury its second request to charge, which is as follows: "I charge you as a matter of law that under the common law the plaintiff is not entitled to recover against the defendant in this case, inasmuch as there is no showing that the automobile which

caused the accident for which suit has been brought was being used by the driver or drivers of the same on the business of the defendant company."

Defendant excepts to the refusal of the court to give to the jury its third request to charge, which is as follows: "I charge you that it appears from the undisputed evidence in this case that the person or persons who were operating the car which caused the accident were not operating or using said car for the business or in the interests of the defendant company."

Defendant excepts to the refusal of the court to give to the jury its fourth request to charge, which is as follows: "I charge you as a matter of law that there is no testimony in the case that there was any permission granted to the driver of the car in question to use the same for any purpose whatsoever or that, while operating the same, he was doing so with the consent of the defendant company."

Defendant excepts to the refusal of the court to give to the jury its fifth request to charge, which is as follows: "I charge you as a matter of law that if plaintiff could recover at all in this case it would be by virtue of subd. 3 of Sec. 10 of Act No. 318 of the Public Acts of 1909 of the State of Michigan, entitled, 'An Act providing for the registration, identification and regulation of motor vehicles operated upon the public highways of this state and of the operators of such vehicles.' "

Defendant excepts to the refusal of the court to give to the jury its sixth request to charge, which is as follows: "I charge you as a matter of law that subd. 3 of Section 10 of Act No. 318 of the Public Acts of 1909 of the State of Michigan is in violation of Section 1 of the 14th Amendment to the Constitution of the United States."

Defendant excepts to the refusal of the court to give to the jury its seventh request to charge, which is as follows: "I charge you as a matter of law that subd. 3 of Section 10 of Act No. 318 of the Public Acts of 1909 of the State of Michigan is unconstitutional, for the reason that it abridges the privileges and immunities of citizens of the United States and of this defendant, and further that it deprives the defendant of property without due process of law, and also that it denies it the equal protection of the laws."

Defendant also excepts to the refusal of the court to grant its motion to direct a verdict, for the reasons stated.

And thereupon the jury retired to the jury room, and after due deliberation returned a verdict in favor of the plaintiff and against the defendant in the sum of one thousand eight hundred forty-three dollars ($1,843).

EXHIBIT "A."

METZGER MOTOR CAR COMPANY
Manufacturers of Automobiles
Capital $500,000.00.
Detroit, Michigan.

Byron F. Everitt, Pres.
William Kelly, Vice-Pres.
William E. Metzger, Sec'y and Treas.

November 16, 1909.

Mr. Gordon,
Office.

Dear Sir:—

As per our conversation, from this time on our factory cars, used for factory purposes in the interest of the Metzger Motor Car Company will be in your charge and it will be up to you, from this time on, as to who can drive these factory cars.

This will put the matter so that you can keep tab and know at all times what the cars are doing and whose hands they are in.

Trusting this will straighten the matter out satisfactorily, we beg to remain,

Yours truly,

Metzger Motor Car Company,
B. F. Everitt,
Pres. & Gen. Mgr.

BFE/REB

The foregoing is the substance of all the evidence introduced at the trial of said above entitled cause. And because none of the foregoing matters, exhibits and exceptions appear of record in said cause, I, Alexis C. Angell, Judge of said court, before whom said cause was tried, at the request of counsel for the plaintiff in error, and after due notice to the adverse party, have settled and signed this bill of exceptions this 1st day of May, A. D. 1912.

(Sgd) Alexis C. Angell,
District Judge.

Filed May 1, 1912. Elmer W. Voorheis, Clerk.

JUDGMENT ON VERDICT FOR PLAINTIFF.

At a session of the District Court of the United States for the Eastern District of Michigan, continued and held pursuant to adjournment at the District Court room in the City of Detroit in said district, on Saturday the eighteenth day of May, in the year of our Lord one thousand nine hundred and twelve.

Present: The Honorable Alexis C. Angell, District Judge.

No. 8729.

John W. Parrott

vs.

Metzger Motor Car Company.

The jury by whom the issue in this cause was tried having rendered a verdict in favor of the plaintiff in the sum of eighteen hundred forty three dollars ($1843.00) damages, now on motion of Silas B. Spier, attorney for the plaintiff, it is by the court now here considered that the said plaintiff do recover against the said defendants his damages aforesaid, including interest from the date of the verdict to this date, which is computed at the sum of Thirty nine and 90/100 Dollars ($39.90), in all of the sum of eighteen hundred eighty two and 90/100 Dollars ($1882.90), together with his costs and charges by him about this suit in this behalf expended to be taxed, and that said plaintiff have execution thereof.

Alexis C. Angell,
District Judge.

DEFENDANT'S ASSIGNMENTS OF ERROR.

UNITED STATES OF AMERICA.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

No. 8729.

John W. Parrott,

Plaintiff,

vs.

Metzger Motor Car Company, a New York Corporation,

Defendant.

The defendant in this action, in connection with its petition for a writ of error, makes the following assignments of error, which it avers occurred upon the trial of this cause, to-wit:

1. The court erred in submitting the case to the jury.

2. The court erred in denying defendant's motion to direct a verdict of no cause of action in favor of the defendant.

3. The court erred in refusing to charge the jury as requested in defendant's first request to charge, as follows:

"Under the pleadings and proofs the plaintiff cannot recover and your verdict must be for the defendant, no cause of action."

4. The court erred in refusing to charge the jury as requested in defendant's second request to charge, as follows:

"I charge you as a matter of law that under the common law the plaintiff is not entitled to recover against the defendant in this case, inasmuch as there is no showing that the automobile which caused the accident for which suit has been brought was being used by the driver or drivers of the same on the business of the defendant company."

5. The court erred in refusing to charge the jury as requested in defendant's third request to charge, as follows:

"I charge you that it appears from the undisputed evidence in this case that the person or persons who were operating the car which caused the accident were not operating or using said car for the business or in the interests of the defendant company."

6. The court erred in refusing to charge the jury as requested in defendant's fourth request to charge, as follows:

"I charge you as a matter of law that there is no testimony in the case that there was any permission granted to the driver of the car in question to use the same for any purpose whatsoever or that, while operating the same, he was doing so with the consent of the defendant company."

7. The court erred in refusing to charge the jury as requested in defendant's fifth request to charge, as follows:

"I charge you as a matter of law that if plaintiff could recover at all in this case it would be by virtue of subd. 3 of Sec. 10 of Act No. 318 of the Public Acts of 1909 of the State of Michigan, entitled, 'An Act providing for the registration, identification and regulation of motor vehicles operated upon the highways of this state and of the operators of such vehicles.' "

8. The court erred in refusing to charge the jury as requested in defendant's sixth request to charge, as follows:

"I charge you as a matter of law that subd. 3 of Section 10 of Act No. 318 of the Public Acts of 1909 of the State of Michigan is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States."

9. The court erred in refusing to charge the jury as requested in defendant's seventh request to charge, as follows:

"I charge you as a matter of law that subd. 3 of Section 10 of Act No. 318 of the Public Acts of 1909 of the State of Michigan is unconstitutional, for the reason that it abridges the privileges and immunities of citizens of the United States and of this defendant, and further that it deprives the defendant of

property without due process of law, and also that it denies it the equal protection of the laws."

Wherefore, said defendant prays that said judgment of the District Court of the United States for the Eastern District of Michigan may be reversed.

Brennan, Donnelly & Van De Mark,
Attorneys for Defendant.

Filed May 30th, 1912. Elmer W. Voorheis, Clerk.

PETITION FOR WRIT OF ERROR AND ALLOWANCE.

UNITED STATES OF AMERICA.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

No. 8729.

John W. Parrott,
Plaintiff,

vs.

Metzger Motor Car Company, a New York Corporation,
Defendant.

And now comes the Metzger Motor Car Company, defendant herein, and says that on or about the 18th day of May, A. D. 1912, this court entered judgment herein in favor of the plaintiff and against this defendant, in which judgment and the proceedings had prior thereto in this cause, certain errors are committed to the prejudice of this defendant, all of which will appear in detail from the assignments of error which are filed with this petition.

Wherefore this defendant prays that a writ of error may issue in its behalf out of the United States Supreme Court for the correction of the errors so complained of, and that a tran-

script of the record and proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court.

Brennan, Donnelly & Van De Mark,
Attorneys for Defendant.

Filed May 30, 1912. Elmer W. Voorheis, Clerk.

Let a writ issue as prayed.

Alexis C. Angell,
District Judge.

SUPERSEDEAS BOND AND BOND ON WRIT OF ERROR.

UNITED STATES OF AMERICA.
IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

No. 8729.

John W. Parrott,

vs.

Metzger Motor Car Company, a New York Corporation,

Defendant.

Know all Men by These Presents, That we, Metzger Motor Car Company, a New York corporation, and having one of its offices and doing business in the City of Detroit, State of Michigan, and the Fidelity Deposit Company of Maryland, a Maryland corporation, of Baltimore, Maryland, are held and firmly bound unto the above named John W. Parrott in the sum of two thousand five hundred dollars ($2,500) to be paid to the said John W. Parrott, for the payment of which sum well and truly to be made we bind ourselves and each of us, our and each of our successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 29th day of May, in the year of our Lord one thousand nine hundred and twelve.

Whereas, the above named Metzger Motor Car Company has taken out a writ of error from the Supreme Court of the United States to reverse the judgment entered in the above entitled cause by the judge of the District Court for the Eastern District of Michigan, Southern Division.

Now, therefore, the condition of this obligation is such that if the above named Metzger Motor Car Company shall prosecute said writ of error to effect, and shall pay and satisfy

such judgment as shall be rendered against it thereon, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

Metzger Motor Car Company.
By B. F. Everitt,
President.

Signed, sealed and delivered in the presence of

.....
.....

Attest:
Wm. E. Metzger,
Secretary. (Corporate Seal)

Fidelity & Deposit Company of Maryland,
By Henry L. Lyster,
Attorney in Fact.

Attest:
Chas. Whitaker,
Agent. (Corporate Seal)

The foregoing bond is approved.

Alexis C. Angell,
District Judge.

May 30, 1912.
Filed May 30, 1912. Elmer W. Voorheis, Clerk.

WRIT OF ERROR.

United States of America, ss:

The President of the United States.

To the Honorable the Judges of the District Court of the United States, Eastern District of Michigan,

Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district before you, or some of you, between John W. Parrott, plaintiff, against Metzger Motor Car Company, defendant, a manifest error hath happened, to the great damage of the said defendant, Metzger Motor Car Co., as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together

with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White Chief Justice of the United States, the thirtieth day of May, in the year of our Lord one thousand nine hundred and twelve.

(Seal of the Court) Elmer W. Voorheis,

Clerk, U. S. District Court, Eastern District of Michigan.

Allowed by

Alexis C. Angell,

United States District Judge, Eastern District of Michigan.

Endorsed on writ: This writ was deposited with me this 30th day of May, A. D. 1912. Elmer W. Voorheis, District Clerk.

CITATION AND PROOF OF SERVICE.

United States of America, ss:

To John W. Parrott. Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the District Court of United States, Eastern District of Michigan, Southern Division, wherein the Metzger Motor Car Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this thirtieth day of May, in the year of our Lord one thousand nine hundred and twelve.

(Signed) Alexis C. Angell,

United States District Judge, Eastern District of Michigan.

United States of America, Eastern District of Michigan, ss:

On this 18th day of June, in the year of our Lord one thousand nine hundred and twelve, personally appeared Henry L. Lyster before me, the subscriber, a Notary Public in and for the county of Wayne and State of Michigan, and makes

oath that he delivered a true copy of the within citation to Silas B. Spier, attorney of record for John W. Parrott, the defendant in error named in the citation.

Henry L. Lyster.

Sworn to and subscribed the 18th day of June, A. D. 1912.

Philip H. Robinson,
(Notarial Seal) Notary Public, Wayne Co., Mich.

My commission expires Mar. 27, 1914.

Endorsed on Citation: Received June 18, 1912. Elmer W. Voorheis, District Clerk.

STIPULATION DESIGNATING RECORD ON WRIT OF ERROR.

UNITED STATES OF AMERICA.
IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

No. 8729.

John W. Parrott,

Plaintiff,

vs.

Metzger Motor Car Company, a Corporation,

Defendant.

It is hereby stipulated and agreed by and between the attorneys for the respective parties in the above entitled cause that, in addition to what is required to be printed according to rule in the record to be filed in the Supreme Court of the United States, the plaintiff in error shall be required to print only the following part of the record and proofs in said cause. viz:

Praecipe for summons;
Order amending summons;
Pluries summons;
Appearance of defendant;
Declaration;
Petition for removal to United States Court;
Bond on removal;
Order of removal;
Certificate of Clerk and Judge of Macomb Circuit Court;

Plea;
Amended declaration;
Entry of trial and verdict;
Order extending time to settle bill of exceptions;
Settlement of bill of exceptions;
Bill of exceptions;
Judgment on verdict;
Petition for writ of error;
Defendant's assignments of error;
Order granting writ of error;
Supersedeas bond;
Citation, with proof of service.

Silas B. Spier,
Attorney for Plaintiff.

Brennan, Donnelly & Van DeMark,
Attorneys for Defendant.

Filed June 24, 1912. Elmer W. Voorheis, Clerk.

ORDER EXTENDING TIME TO FILE PRINTED RECORD ON WRIT OF ERROR.

At a session of the District Court of the United States for the Eastern District of Michigan continued and held pursuant to adjournment at the District Court Room in the City of Detroit, in said District, on Saturday the Twenty-ninth day of June in the year of our Lord one thousand nine hundred and twelve.

Present: The Honorable Clarence W. Sessions, District Judge, Sitting by Designation.

No. 8729.

John W. Parrott,

vs.

Metzgar Motor Car Company.

In this cause upon the application of the Clerk, for cause shown, it is by the court now here ordered that the time to docket the case and file printed record on writ of error in the Supreme Court of the United States be and the same is hereby extended to and including the Twenty-fifth day of July, A. D. 1912.

C. W. Sessions,
District Judge, Sitting by Designation.

In the District Court of the United States for the Eastern District of Michigan.

JOHN W. PARROTT
vs.
METZGER MOTOR CAR COMPANY.

EASTERN DISTRICT OF MICHIGAN,
Southern Division, ss:

I, Elmer W. Voorheis, Clerk of the District Court of the United States for the Eastern District of Michigan, do hereby certify and return to writ of error of the Metzger Motor Car Company in the above entitled cause; that it is a true copy of the records and proceedings stipulated by attorneys to be included in printed record on writ of error to the Supreme Court of the United States, as the same appe-r of record and on file in my office; that I have compared the same with the originals and they are true and correct copies therefrom and of the whole of said originals as stipulated to be included in this printed record, as aforesaid.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Detroit, in said District, this 17th day of July, in the year of our Lord one thousand nine hundred and twelve, and of the Independence of the United States of America the one hundred and thirty-seventh.

[Seal of the U. S. District Court, Eastern District of Mich.]

ELMER W. VOORHEIS,
Clerk United States District Court for the Eastern District of Michigan.

Endorsed on cover: File No. 23,305. E. Michigan D. C. U. S. Term No. 730. Metzger Motor Car Company, plaintiff in error, vs. John W. Parrott. Filed July 23d, 1912. File No. 23,305.

(20,396)

FILED
MAR 9 1914
MILES D. MAHER
CLERK

Supreme Court of the United States

(October Term, 1913, No. 309.)

METZGER MOTOR CAR COMPANY,
Plaintiff in Error,
vs.
JOHN W. PARROTT,
Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Michigan.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN C. DONNELLY,
HENRY L. LYSTER,
Counsel for Plaintiff in Error.

DETROIT:
CONWAY BRIEF CO., 142-150 LAFAYETTE BOULEVARD
1914.

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(23,305)

Supreme Court of the United States

METZGER MOTOR CAR COMPANY,
Plaintiff in Error,
vs.
JOHN W. PARROTT,
Defendant in Error.

(October Term, 1913, No. 309.)

STATEMENT OF THE CASE.

This action was originally begun by John W. Parrott as plaintiff, in the Circuit Court for the County of Macomb in the State of Michigan. The defendant, Metzger Motor Car Company, is a New York corporation. The amount of damages claimed in the declaration was $5,000, and on petition of defendant, the case was removed to the Circuit Court of the United States for the Eastern District of Michigan, on the grounds of diverse citizenship. The case was duly tried and a verdict was returned in favor of the plaintiff.

Plaintiff relied principally upon a section of what is known as the Automobile Act of the State of Michigan, hereinafter more fully set forth. The District Judge stated very clearly, both during the progress of the trial

and in his charge, that without this statute, plaintiff had no cause of action against the defendant company. The constitutionality of this Act was attacked at the trial, and although the District Judge expressed himself as having grave doubts as to its validity, he permitted the case to go to the jury with the result as above stated.

This case is therefore before this court, having come direct from the District Court of the United States for the Eastern District of Michigan, being a case in which the law of a state is claimed to be in contravention of the Constitution of the United States. (*Act March 3, 1891, c. 517, Section 5, 26, Stat. at L. 827, 1 Comp. stat. page 549, Judiciary Act, approved March 3, 1911, Section 238.*)

The petition for removal to the United States Circuit Court was filed in April, 1911, and the case was tried in December, 1911. The new judiciary act approved March 3d, 1911, did not take effect until January 1st, 1912, after the removal of the case at bar to the United States Court. The jurisdictional amount at the time of removal was $2,000, and the United States Circuit [now District] Court was the proper tribunal, having jurisdiction.

John W. Parrott, defendant in error, is a resident of Mt. Clemens, Michigan, located about twenty miles from Detroit. On July 13th, 1910, he was thrown from a cart in which he was driving, and which was run into by an automobile driven by one Garfield Coulter, an employee of The Metzger Motor Car Company, plaintiff in error.

In the vehicle with the defendant in error were J. Wesley Parrott, his son, and Thomas Barry, also of Mt. Clemens. All three were thrown to the ground and all claim to have suffered personal injuries and all three have commenced suits in various courts for the recovery of damages.

The accident happened between twelve and one o'clock at night[1] on what is known as the Gratiot Road, which is the main highway between Detroit and Mt. Clemens. The scene of the accident was in Macomb County, about two and one-quarter miles south of Mt. Clemens.[2] Plaintiff and his companions had been in Detroit where they had spent the day, and had purchased three horses and a cart. One of the horses was hitched up to the shafts, another was on the right-hand side, and another followed behind, being lead. The cart had no lantern.[3]

The automobile driven by Coulter was going in the same direction—from Detroit to Mt. Clemens—and came upon the cart and horses from behind. The evidence shows that the acetylene or headlights were not lighted. On the other hand it would appear that the ordinary oil lamps on both sides, as required by law, were lighted.[4]

Coulter had a party of friends with him in the automobile.[5] He was not upon the business of the company as is apparent from the record, but was upon what is commonly known as a "joy ride."[6] He lived and worked in Detroit and it was nothing but pleasure that would take him to Mt. Clemens at one o'clock in the morning. Coulter died before the trial of this case.[7]

The plaintiff in error had rules regarding the use of its cars, and the matter was put in the hands of the factory manager by Mr. Everitt, president and general manager.[8] In order for the testers or other employees to get a car out of the factory grounds, they had to pass a watchman

1 Record p. 22.
2 Record p. 22.
3 Record p. 23.
4 Record p. 27.
5 Record pp. 26, 32.
6 Charge of Court, Record p. 39.
7 Record pp. 27, 37.
8 Exhibit "A," Record p. 44.

who had charge of the gate during the regular working hours. The testers, who were on their regular duty of testing, could go through the gate without a pass, but if what is known as a factory or officer's car was taken out, the person driving it (unless he were an officer of the company), had to show a pass to the watchman before he could get through the gate.[9] During the day the watchman or gateman was on duty, but at night the gates were locked.[10] It was against the rules for automobiles to go out during the day and remain over night.[11] Coulter was a tester who sometimes acted as chauffeur when the president or some other officer of the company wanted to use him. No pass was issued to Coulter on the day in question and the works manager only learned the day after the accident that the car had been taken out.[12] It appears from the record that one of the factory cars was used to take Mr. Everitt, the president, to the railroad station in order that he might catch a train.[13] The car in question was standing in front of the office building outside of the yard on the street next the curb.[14] After taking Mr. Everitt to the train, it was the duty of the chauffeur to take the car back to the factory. This Coulter did not do. The car was not seen again at the factory until after the accident.[15]

It is apparent from the record that there is no common law liability on the part of the Metzger Motor Car Co. Coulter had taken the car without permission, was using it for his own pleasure, and was not upon company business. The District Judge made this very clear throughout

9 Record p. 27.
10 Record p. 29.
11 Record p. 29.
12 Record p. 28.
13 Record p 32.
14 Record p. 32.
15 Record p. 32.

the trial and in his charge.[16] Apart from the statute referred to below, there could be no recovery.

The statute referred to, and upon which defendant in error relied, is Act No. 318 of the Public Acts of 1909 of the State of Michigan. Section 10, Subdivision 3 of this Act is as follows:

> "Sub. 3. Liability of Owners—The owner of a motor vehicle shall be liable for any injury occasioned by the negligent operation by any person of such motor vehicle, whether such negligence consists in violations of the provisions of a statute of this State or in the failure to observe such ordinary care in such operation as the rules of the common law require; but such owner shall not be so liable in case such motor vehicle shall have been stolen."

The plaintiff in error contended throughout the trial that this section of the statute referred to was unconstitutional in that it was in violation of the fourteenth amendment of the Constitution of the United States. Counsel for plaintiff in error urged this point at the trial and moved the court to direct a verdict in favor of the Metzger Motor Car Company for the reasons stated.[17] This motion was denied and defendant took an exception. The District Judge was uncertain, stating that he had "very grave doubts as to the validity of this act" but permitted the case to go to the jury. Plaintiff in error then submitted certain requests to charge, and upon the refusal of the court to grant these requests, took an exception. Requests No. 6 and 7 raised the question of the constitutionality of the act, stating it to be in conflict with the fourteenth amendment of the Constitution of the United States. The refusal of the court to give these requests to charge[18] was excepted to.[19] A verdict was returned in favor of the plaintiff and against the defendant (plaintiff in error) in the sum of $1,843.[20]

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16 Record p. 30, 39.
17 Record p. 38.
18 Record p. 19.
19 Record p. 43.
20 Record pp. 43, 45.

Subsequent to the trial of this case, suit was commenced in the Circuit Court for the County of Macomb against the Metzger Motor Car Company, by one Thomas Barry who was riding with Parrott, defendant in error in this case, at the time he was injured. Barry was also one of the principal witnesses for Parrott in the case at bar. The *ad damnum* in the Barry case was placed at $1,900 so that the case could not be removed to the United States Court.

The Barry case was duly tried in the Macomb Circuit Court where a verdict was obtained for the plaintiff. A writ of error was taken out in the Supreme Court of Michigan, and that case came on to be heard before that court. The constitutionality of the section of the Automobile Act in question was also attacked in the Barry case, and the Supreme Court of Michigan decided that this section of the Automobile Act in question was in contravention of the fourteenth amendment of the Constitution of the United States, and the judgment in the case of *Barry vs. The Metzger Motor Car Company*[21] was reversed.

We are thus in the novel position of asking the Supreme Court of the United States to hold unconstitutional an act of a State which has already been held unconstitutional by the Supreme Court of that State. We had expected that counsel for defendant in error would consent to the vacation of the judgment in the United States District Court for the Eastern District of Michigan when the decision was handed down by the Supreme Court of Michigan holding this act unconstitutional. Counsel, however, has so far refused to consent to such a course of procedure, so that we are forced to file this brief in the usual course, in order that the judgment of the District Court may not be affirmed, but will be reversed.

21 141 North Western Reporter, 529.

SPECIFICATION OF ERRORS RELIED UPON.

(1) The District Court of the United States for the Eastern District of Michigan erred in denying the motion of plaintiff in error at the trial, to direct a verdict in its favor. The motion was made by counsel for plaintiff in error at the close of the testimony, and is as follows:

> "I would like to make a motion to the effect that a verdict be directed in this action of no cause of action for the defendant, for the reason that under the showing in this case there has been nothing for which the defendant could be found guilty of negligence at common law. Secondly: that the statute which is invoked in this proceeding is unconstitutional for the reason that it is in conflict with the 14th Amendment to the Constitution. The statute here involved is Act 318 of the Public Acts of 1909, Section 10, Subsection 3, Liability of Owners."[22]

To which the court, upon due deliberation, responded as follows:

> "In reference to the motion made this morning on the part of the defendant, after some consideration, while I have very grave doubts as to the validity of this Act, I am inclined on the whole to say it is not so absolutely clear to me that it is invalid, and I hardly feel that I ought to direct a verdict by reason of the invalidity of the Act. Taken in connection with Act No. 33, it presents a very difficult question, both the interpretation of the Acts so as to make them harmonize, and the constitutionality or validity; but on the whole, I hardly think I ought to grant the motion. The motion is denied. I trust my ruling will be reviewed by the higher court."[23]

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22 Record p. 38.

23 Record p. 38.

Plaintiff in error duly excepted to the refusal of the court to grant this motion,[24] and has assigned error upon the refusal of the court to grant this motion (Assignment of Error No. 2).[25]

(2) The District Court of the United States for the Eastern District of Michigan erred in refusing to instruct the jury in accordance with instruction No. 6 submitted by plaintiff in error at the trial of said cause. This instruction is as follows:

> "6. I charge you as a matter of law that Subdivision 3 of Section 10 of Act No. 318 of the Public Acts of 1909 of the State of Michigan, is in violation of Section 1 of the 14th Amendment to the Constitution of the United States."[26]

An exception was duly taken by defendant (plaintiff in error) to the refusal of the court to instruct the jury as requested in its sixth request to charge.[27]

Plaintiff in error has duly assigned error upon the refusal of the court to instruct the jury in accordance with the sixth request to charge (Assignment of Error No. 8).[28]

(3) The District Court of the United States for the Eastern District of Michigan erred in refusing to instruct the jury in accordance with instruction No. 7 submitted by plaintiff in error at the trial of said cause. This instruction is as follows:

> "7. I charge you as a matter of law that Subdivision 3 of Section 10 of Act No. 318 of the Public Acts of 1909 of the State of Michigan, is unconstitutional for the reason that it abridges the privileges and immunities of citizens of the United States and of this defendant, and further,

24 Record pp. 38, 43.
25 Record p. 46.
26 Record p. 19.
27 Record p. 43.
28 Record p. 47.

> that is deprives the defendant of property without due process of law and also that it denies it the equal protection of the laws."[29]

An exception was duly taken by defendant (plaintiff in error) to the refusal of the court to instruct the jury as requested in its seventh request to charge.[30]

Planitiff in error has duly assigned error upon the refusal of the court to instruct the jury in accordance with the seventh request to charge (Assignment of Error No. 9).[31]

(4) The District Court of the United States for the Eastern District of Michigan erred in refusing to instruct the jury in accordance with instruction No. 2 submitted by plaintiff in error at the trial of said cause.[32] This instruction is as follows:

> "I charge you as a matter of law that under the common law the plaintiff is not entitled to recover against the defendant in this case inasmuch as there is no showing that the automobile which caused the accident for which suit has been brought, was being used by the driver or drivers of the same on the business of the defendant company."

Exception was duly taken by defendant (plaintiff in error) to the refusal of the court to instruct the jury as requested in its second request to charge.[33]

Plaintiff in error has duly assigned error upon the refusal of the court to instruct the jury in accordance with the second request to charge (Assignment of Error No. 4).[34]

(5) The District Court of the United States for the Eastern District of Michigan erred in refusing to instruct

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29 Record p. 19.
30 Record p. 43.
31 Record p. 47.
32 Record p. 18.
33 Record p. 42.
34 Record p. 46.

the jury in accordance with instruction No. 1 submitted by plaintiff in error at the trial of said cause.[35] This instruction is as follows:

> "1. Under the pleadings and proofs the plaintiff cannot recover and your verdict must be for the defendant no cause of action."

Exception was duly taken by defendant (plaintiff in error) to the refusal of the court to instruct the jury as requested in its first request to charge.[36]

Plaintiff in error has duly assigned error upon the refusal of the court to instruct the jury in accordance with the first request to charge (Assignment of Error No. 3).[37]

(6) The District Court of the United States for the Eastern District of Michigan erred in refusing to instruct the jury in accordance with instruction No. 3, submitted by plaintiff in error at the trial of said cause.[38] This instruction is as follows:

> "I charge you that it appears from the undisputed evidence in this case that the person or persons operating the car which caused the accident, were not operating or using said car for the business or in the interests of the defendant company."

Exception was duly taken by defendant (plaintiff in error) to the refusal of the court to instruct the jury as requested in its 3rd request to charge.[39]

Plaintiff in error has duly assigned error upon the refusal of the Court to instruct the jury in accordance with the 3rd request to charge (Assignment of Error No. 5).[40]

(7) The District Court of the United States for the Eastern District of Michigan erred in refusing to instruct

35 Record p. 18.
36 Record p. 42.
37 Record p. 46.
38 Record p. 18.
39 Record p. 43.
40 Record p. 47.

the jury in accordance with instruction No. 4 submitted by plaintiff in error at the trial of said cause.[41] This instruction is as follows:

> "4. I charge you as a matter of law that there is no testimony in the case that there was any permission granted to the driver of the car in question to use the same for any purpose whatsoever, or that while operating the same he was doing so with the consent of the defendant company."

Exception was duly taken by defendant (plaintiff in error) to the refusal of the Court to instruct the jury as requested in its 4th request to charge.[42]

Plaintiff in error has duly assigned error upon the refusal of the Court to instruct the jury in accordance with the 4th request to charge (Assignment of Error No. 6).[43]

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41 Record p. 18.
42 Record p. 43.
43 Record p. 47.

ARGUMENT.

The record in this case shows conclusively that plaintiff had no common law right of action. Coulter, the driver of the motor car, was not upon the business of the defendant company and had taken the automobile without permission and for his own personal use and pleasure. He was undoubtedly using the car to entertain friends on what is commonly known as a "joy ride," and even by the widest stretch of the imagination, could not be held to be acting within the scope of his employment at the time of the accident. These facts are made perfectly clear from a reading of the record, and are not in any way controverted by the evidence. The District Judge was of this opinion and stated in plain terms, both during the trial and in his charge to the jury, that this was the case, and that if it were not for the statute invoked by plaintiff, he would have no hesitancy about directing a verdict in favor of the defendant company.

During the trial, the Court made the following statement:

> "I shall not allow a recovery here apart from the statute, unless you show, not only that he had the right to take this car, but at the time of the accident he was doing something in the line of his duty for the company. I do not know whether that will help you any to have me intimate that now. The point I make is this, that the mere fact—if it were a fact—that Coulter had permission to take the car —not a testing car but a touring car that is in evidence here—would not make the company in any sense liable if mishaps happened to him while on the road from Mt. Clemens with his friends, unless it was on company business. If you have any authorities I will be glad to hear you."[44]

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44 Record p. 30.

No testimony was offered by plaintiff to change the Court's view as to the facts, and in his charge, the Court makes the following statement as to the law and facts:

> "You have heard some discussion here about the law. It is perfectly apparent to all of us what the man driving the car was doing. He was taking his friends out to drive, some of them, and that is all there was to it, that part of it. It is also perfectly clear he had no business to be using the car in that way at that time so far as the company was concerned; he was not on the company's business; he was on his own affairs, and if it were not for the statute we have been talking about I should direct a verdict at once on the facts before the court, but I do not feel at liberty to do so because of this statute. It was passed in 1909 and it undertakes in form at least, to make an owner, either you or me, or a manufacturer, responsible for the damage done by the machine even if it is driven without any consent of the owner by somebody who gets it without any right. You have just heard me say I did not feel at liberty as a judge to say that law was necessarily and certainly unconstitutional. However, you or I may feel about any such law, until some court does set it aside or the legislature changes it, we have got to adminster it, you and I."[45]

It will thus be seen that plaintiff's whole right to be in Court rested entirely upon the Section of the statute which we have quoted verbatim on page 5. of this brief, so that if this statute or that part of it upon which plaintiff depended, is declared to be invalid, it is as though it had never existed and plaintiff stands without any cause of action against the defendant (plaintiff in error) as disclosed by the record in this case.

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45 Record p. 39.

I.

Sub. 3 of Sec. 10 of Act No. 318 of the Public Acts of 1909 of the State of Michigan has been held to be in contravention of the Fourteenth Amendment of the Federal Constitution by the court of last resort in Michigan; therefore the case at bar must be considered as though this Act had never been passed by the Legislature.

When counsel for plaintiff in error took out a writ of error in this court, it was our intention to convince this court that the statute in question was in contravention of the 14th Amendment to the Constitution of the United States, as at that time the Act in question had been upheld by various trial courts throughout the State, but had not been passed upon by the court of last resort. While this case has been resting here, however, we were able to bring the matter before the Supreme Court of Michigan in another case, growing out of the same accident, begun by one of plaintiff's principal witnesses. In this case the court of last resort in Michigan, held the Section of the statute which is in controversy here, unconstitutional. The case referred to is that of *Barry vs. Metzger Motor Car Co.* 141 N. W. Rep., 529.[46]

The case of *Barry vs. Metzger Motor Car Co., supra*, reaffirmed the decision in *Daugherty vs. Thomas*, 174 Michigan, 371.[47]. The facts in the latter case are similar to those in the case at bar, and Subdivision 3 of Section 10 of the Automobile Act was brought directly before the Supreme Court of Michigan as to its validity. The court says (p. 376.):

> "This brings us to the consideration of the important question in this case, whether Subdivision

46 Opinion filed May 28, 1913. This case will appear in Vol. 175, Michigan Reports, when published.
47 Decided March 20th, 1913.

> 3 of Section 10 of the Act under consideration, is void as being a deprivation of property without due process of law and of the equal protection of the laws within the 14th Amendment to the Federal Constitution. * * *"

It is not necessary here to consider the reasons advanced by the Supreme Court of Michigan in holding an Act of its own legislature unconstitutional, as it is not to be considered for a moment that the Supreme Court of the United States would sustain the validity of an Act of a State which had already been held invalid by the highest court of that State. The matter was thoroughly considered by the Supreme Court of Michigan and a large number of cases, both State and Federal, are cited by the court. The conclusion reached by the court in *Daugherty vs. Thomas, supra*,[48] is as follows (p. 390):

> "To hold Subdivision 3 of Section 10 constitutional is to hold a party absolutely liable for the negligent conduct of another, a mere stranger or a wilful trespasser, no matter how careful or free from negligence he himself has been. We think that the result of such holding would be to take the property of defendant Thomas to pay for the wrongful and negligent act of another person not sustaining to him the relation of servant, agent or employee. Such a doctrine seems unnatural and repugnant to the provisions of the Constitution here invoked. We are forced to the conclusion that the provisions of this Subdivision are not a necessary regulation in the exercise of the police power; that in and by its terms the plain provisions of the Constitution are violated; and the Subdivision must be held unconstitutional and the statutory liability therein asserted, done away with."

Had this decision in *Daugherty vs. Thomas, supra*,[48] been handed down prior to the trial of the case at bar, the District Judge would have directed a verdict in favor of the defendant company, and rightly so. As the judgment in this case is founded upon an invalid statute, held by the court of last resort in the State of its origin to be uncon-

48 174 Mich., 371.

stitutional, it is as though the Subdivision of the Act in question had never existed. This being the case, the judgment of the District Court for the Eastern District of Michigan should be reversed.

Some time after the trial of the case at bar, but prior to the decision in the case of *Daugherty vs. Thomas*, referred to above, the Supreme Court of Michigan decided the case of *Johnson vs. Sergeant*, 168 Michigan, 444. In this decision, while the question of the constitutionality of the law is not thoroughly discussed, nor is the relation of the Act in question to the 14th Amendment of the Federal Constitution touched upon, the court uses language which might lead one to believe that it sustained the Act as being a proper regulation under the Police Power. The Supreme Court of Michigan, however, in the *later* case of *Daugherty vs. Thomas, supra*, where the question was fully discussed, calls attention to its decision in *Johnson vs. Sergeant, supra*, and in order that there may be no question as to the stand taken by the court, it uses the following language (p. 390):

> "And insofar as what we have held conflicts with *Johnson vs. Sergeant*, the latter case must be overruled."

We call the court's attention to this case, because in the cases of *Barry vs. Metzger Motor Car Co., supra*,[49] counsel for plaintiff (defendant in error), relied principally upon *Johnson vs. Sergeant* in his argument before the Supreme Court of Michigan, but without avail, as in *Barry vs. Metzger Motor Car Co.*, the court reaffirmed its holding in the case of *Daugherty vs. Thomas*.

In *Daugherty vs. Thomas, supra*,[48] the Supreme Court of Michigan gives at length its reasons for holding the Subdivisions of the Automobile Act in question unconstitutional, and cites the following cases:

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49 141 N. W. Rep. (Mich.), 529.

Camp vs. Rogers, 44 Connecticut, 291;
Ives vs. Railway Co., 201 New York., 271;
Ohio, etc., Railroad Co. vs. Lackey, 78 Illinois, 55;
State vs. Redmon, 134 Wisconsin, 89;
Lawton vs. Steele, 152 U. S., 137;

and numerous other cases to which we respectfully refer this court.

In *Barry vs. Metzger Motor Car Co.*,[49] the Supreme Court of Michigan went even further than in *Daugherty vs. Thomas*,[48] and held that the act in question could not be upheld even where the wrongdoer sustained to the owner the relation of servant or employee. We have already called the Court's attention to the fact that this case grew out of the same accident as the one now before the court.

In the case of *Lochr vs. Abell*, 174 Michigan, 590, the court goes even further, holding that the Act in question cannot be applied even where the car was driven by the owner's minor son, with the father's permission, in the absence of testimony showing he was acting as his agent.

II.

The automobile is not an inherently dangerous machine, and cannot be classified with dynamite and vicious animals.

The automobile is not a dangerous machine, that is, it is not dangerous *per se*. Standing at the curb of a street an automobile is perfectly harmless, and is not as dangerous as a horse and carriage. When in operation it is also harmless and can be more easily and quickly controlled than horses under like circumstances. It is only when the motor car is being driven by an inexperienced or intoxi-

cated or reckless driver that it becomes dangerous. This can also be said of horses. A team of horses driven by a drunken coachman is as much to be avoided as an automobile driven by a drunken chauffeur.

The courts have consistently refused to hold the automobile an inherently dangerous machine, and have refused to put it in the same class with dynamite and vicious animals. *Huddy*, in his work on "*Automobiles*" (p. 29), makes the following statement in regard to this question:

> "That the courts have refused to stamp the automobile as an inherently dangerous machine should be stated at the outset. To use legal phraseology, the motor vehicle is not considered in law as dangerous *per se*. The fact that it has been judicially established that the automobile is not inherently dangerous is of the greatest importance to automobilists and the automobile industry of the United States, since a limit has now been placed upon the character of motor vehicle legislation which may constitutionally be enacted."

In the case of *Lewis vs. Amorous*, 3 Georgia App. Rep. 50, 59 S. E. Reporter, 338, the court says:

> "It is insisted in the argument that automobiles are to be classed with ferocious animals and that the law relating to the duty of the owner of such animals is to be applied. It is not the automobile that is to be feared, but the ferocity of those who drive them. Until human agency interferes they are usually harmless. While, by reason of the rate of pay alloted to the judges of this state, few, if any, have ever owned one of these machines, yet some of them have occasionally ridden in them, thereby acquiring some knowledge of them, and we have therefore found out that there are times when these machines not only lack ferocity but assume such an indisposition to go that it taxes the limit of human ingenuity to make them move at all. They are not to be classed with mad dogs, vicious bulls, evil disposed mules and the like."

The Supreme Court of Washington has also passed upon this question in the case of

Jones vs. Hoge, 47 Wash., 663, 92 Pacific Reporter, 433;
14 L. R. A. (N. S.), 216.

The Court says:

> "We do not believe that the automobile can be placed in the same category as locomotives, gunpowder, dynamite, and similar dangerous machines and agencies. It is true that the operation of these machines is attended with some dangers not common to the use of ordinary vehicles, and we believe and have already held that those who operate these machines must be held to that degree of care which is commensurate with the dangers naturally incident to their use."

This question also came before the Supreme Court of New York in the case of *Cunningham vs. Castle*, 111 N. Y. Supp., 1057-1061; 127 N. Y. App. Div., 580. In that case the court held that:

> "The automobile is not necessarily a dangerous device. It is an ordinary vehicle of pleasure and business. It is no more dangerous *per se* than a team of horses and a carriage, or a gun, or a sailboat, or a motor-launch."

In the case of *Colwell vs. Aetna Bottle & Stopper Co.*, 33 Rhode Island, 531, under a somewhat similar state of facts the Court held that the defendant, the master, could not be held liable for the acts of the servant who was driving the car upon his (the servant's) own business and pleasure. In that case it was contended by plaintiff that an automobile is an instrumentality dangerous *per se* and that if the master entrusts such a machine to his servants for his use upon a public highway and injury results from the negligence of the servant, the master is liable. This the Court denies and quotes at length from the case of *Steffens vs. McNaughton*, 142 Wisconsin, 49, which case it approves.

III.

In order to hold the master for the negligent acts of a servant it must be shown that these acts are within the scope of the servant's employment, and that they were done in conducting the business of the master.

Proof of the above facts are indispensable to a recovery by the plaintiff. An examination of the record convinces us without question that the acts committed by the tester or chauffeur of the defendant company, Coulter by name, were not within the scope of his employment, nor were they done while he was conducting the business of said company. There is not a scintilla of evidence in the record which could lead one to any such conclusion.

The driver of the motor car not only did not have permission to use the car, but had taken it out against the express instructions of the defendant company and for the purpose of entertainment of himself and friends. Charles Gordon who was the factory manager of the defendant company, testifies as follows:[50]

> "I recall the occasion of Mr. Everitt being taken down to the depot by Mr. Coulter to take a train the day before the accident. Mr. Everitt took Coulter to have him drive to the train and bring his car back to the factory.
>
> "He did not bring this car back to the factory. I next heard of the accident the day of the accident. I had some conversation with Coulter with reference to the accident. I reprimanded Coulter for taking this car out on the evening in question."

Further, the same witness testifies:[51]

> "Q. Was there anything further said as to what should be done with the car?

50 Record p. 32. 51. Record p. 33.

"A. I told him to take Mr. Everitt to the train and be careful with the car and get it right back."

Even if Coulter had been given permission to use the car on the evening in question, this fact would not in any way alter the situation. The fact that the master permits his servant to use his automobile would not make the master liable provided it is not being used on the business of the master. Nor does the fact that because of the relation of master and servant, instrumentalities were thrown in the way of the servant (as in this case an automobile), which the servant would otherwise not have been able to get possession of, alter the situation and render the master liable.

The following authorities will bear us out in what we have here stated:

The case of *St. Louis Southwestern Railway vs. Harvey*, 144 Fed., 806; 69 C. C. A., 444, presents facts which are somewhat similar to the facts in the case now before the court. In the case just cited certain employees or servants of the railway company took a hand-car after working hours and without permission, and ran it upon the railway company's tracks without any lights, and for their own purpose or pleasure. It collided with another car, injuring plaintiff. The Circuit Court of Appeals for the Eighth Circuit, through Circuit Judge Sanborn, lays down the following statement of the law:

> "The first question for consideration in the case, therefore, is, was there any substantial evidence at the trial sufficient to sustain a finding of the jury that this fact existed? *It is not enough that there was evidence that these men were engaged in the business of the corporation during their working hours or at other times or places, but it was necessary to produce evidence that they were thus employed at the time and place of the collision.* The finding of this fact required an affirmative answer to two questions which conditioned it, was there substantial evidence that the act of operating this car upon the railroad upon its northward trip from Jonesboro in the dark at 8 o'clock in the evening

> was *within the scope of the duty* assigned to these men under their employment? for if it was not the master was not liable for their acts in that regard although those acts were done during the time of their engagement about the business of their master. *Bowen vs. Illinois Central R. Co.* (C. C. A.), 136 Fed., 306, 311-316, wherein a station agent while delivering a package at the window of his office short the addressee, and the company was held to be exempt from liability because the act was not within the scope of his duty; *Walker vs. Ry. Co.*, 121 Mo., 575, 584-588; 26 S. W., 360; 24 L. R. A., 363; 42 Am. St. Rep., 547. The second query is, was there substantial evidence that the act of running this car upon the track at night without a light was done *in the conduct of any of the business of the master?* for if a servant step aside from the business of his master for ever so short a time to do any act that is not a part of that business the relation of master and servant is for the time suspended and the acts of the servant during that interval are not his master's but his own. *Benson vs. Chicago, St. P., M. & O. Ry. Co.*, 78 Minn., 303, 307, 308; 80 N. W., 1050; *Baker vs. Kinsey*, 38 Cal., 631, 633; 99 Am. Dec., 438; *Georgia Railroad Co. vs. Wood*, 94 Ga., 126; 21 S. E., 288; 47 Am. St. Rep."

The question of scope of employment is also discussed in the case of *Bowen vs. Illinois Central Railroad Co.*, 136 Fed. Rep., 306. This is an opinion of the Circuit Court of Appeals, Eighth Circuit. In this case the court cites numerous cases and text books upon this proposition, among others *Elliott on the Law of Railroads*, Vol. 3, p. 1009:

> "The general rule is that the master is liable for the wilful acts of the servants with reference to the master's orders or within the scope of their employment, or the line of their duty, *but not otherwise*."

In *Patterson vs. Kates*, 152 Fed., 481, it was held that plaintiff could not recover for injuries from a servant who was driving an automobile, where he was not operating the machine on business of the master. In that case defendant's automobile had broken down and he instructed

his driver to repair the machine and bring it to its destination. On his way the driver met a friend, whom he offered to take to a place about a mile away from the highway upon which he was driving. This being done, the driver started back to the highway and on his way ran into plaintiff, injuring him. The court held the master not liable on the ground that the driver had temporarily abandoned his employment and had gone off upon an expedition of his own for a purpose in no way connected with his duty, but, on the contrary, opposed thereto.

Similar to the above case is that of *Danforth vs. Fisher*, 75 N. H., 111; 71 Atlantic, 535; 21 L. R. A. (N. S.), 93. In that case it was held that the owner of an automobile is not liable for the act of his chauffeur in colliding with a team on the highway, where at the time of the accident the chauffeur is returning from an errand of his own to reach the place to which he had been directed to take the machine at an appointed time.

Similar to the above is the case of *Steffin, Admr. vs. McNaughton*, 142 Wis., 49, 124 N. W., 1016; 26 L. R. A. (N. S.), 382. In that case plaintiff's intestate was struck and killed by an automobile operated by a chauffeur of the defendant. The chauffeur had full charge of the automobile under the direction of the defendant and his family. Under his contract of employment defendant did not furnish the chauffeur with his meals and the chauffeur went to his home for them. He had not been directed by his employer to use the machine to go for his meals, and had never obtained permission to so use it. At the time of the accident the chauffeur was alone in the automobile and was going home for his dinner. The court held that the chauffeur was not acting within the scope of his employment and that the master could not be held liable for the death of plaintiff's intestate. See also

Stuart vs. Barouch, 103 App. Div., 577; 93 N. Y. Supp., 161;

Reynolds vs. Buck, 127 Iowa, 601; 103 N. W., 946.

In *Hartley vs. Miller*, 165 Mich., 115, the Supreme Court of Michigan held that the owner of an automobile riding in his car as a guest of a person who had borrowed and was driving the machine, was not liable to a third person injured by the driver's negligent operation thereof.

In *Riley vs. Roach*, 168 Mich., 294, the same court held that the master was not liable for injuries caused by his chauffeur, who disobeyed instructions and took his automobile out with several guests that were staying at the house.

Both of the above Michigan cases last cited were decided by the Supreme Court of Michigan after the enactment of the Automobile Act in question in this case, but the cause of action in each case arose prior to the enactment of said Act. As the subdivision of the Act in question has since been held unconstitutional by the court that rendered these decisions, both of the above cases have now the same weight as though the Automobile Act had never been passed by the Legislature.

In *Barry vs. Metzger Motor Car Company*, 141 N. W. (Mich.), 529, the facts are the same as the case at bar, the cause of action arising out of the same accident as we have stated on page 14 of this brief. The defendant, Metzger Motor Car Company, was held not to be liable. See also

Slater vs. Advance Thresher Co., 97 Minn., 305; 107 N. W., 133; 5 L. R. A. (N. S.), 598;

Evans vs. Dyke Automobile Supply Co., 121 Mo. App., 266; 101 S. W., 1132;

Lotz vs. Hanlon, 217 Pa. St., 339; 66 Atlantic (Pa.), 525.

The case of *Lochr vs. Avell*, 174 Mich., 590, goes further than any of the cases above cited, for in that case the driver of the car was defendant's own minor son, fifteen

years of age. The statute in question in this case was invoked in that case and the Supreme Court of Michigan reaffirmed its holding in *Daugherty vs. Thomas, supra.*,[48] that the statute is unconstitutional. In that case it was inferred that the operator of the car was using it with defendant's permission or license. The court held, however, that as the evidence showed, the operator was using it for his own pleasure. The court says (p. 593):

> "We do not find in the record testimony tending to establish common law liability of defendant, nor any affirmative testimony upon the subject of the authority of the son to use the car. It is to be inferred that the son used the car by permission of his father, the owner, but for his own pleasure. We have, since the case at bar was tried, distinctly held that the provision of the Act of 1909 above set out is void, *Daugherty vs. Thomas*, Ante 71 (140 N. W., 615.)[48] The requests to charge preferred by defendant and last above set out, contains a correct statement of the law under our decision in that case. We reverse the judgment, with costs to appellant."

The master is not liable for the negligence of his servant who takes and uses his automobile without his knowledge or permission, and uses it for his own personal business or pleasure, even though he was not a competent and careful operator.

Jones vs. Hoge, 47 Wash., 663;
92 Pacific Reporter, p. 433;
14 L. R. A. (N. S.), 216.

In *Walton vs. New York Central Sleeping Car Co.*, 139 Mass., 556, it was held that the owner of a parlor car in use on a railroad was not liable for an injury caused to a person not a passenger by the porter of the car who was in its employ, throwing from the car a bundle containing his soiled clothing and other personal property solely for his own convenience.

In *McCarthy vs. Timmins*, 178 Mass., 378, it was held that a driver of a public carriage is not acting within the

scope of his employment who, when ordered to drive to the stable, his day's work being done, turns out of his course and drives some distance in an opposite direction in order to visit a saloon to get a drink, where he leaves his horses unattended, and his employer is not liable to a traveler on the highway who is injured by the horses, running away.

In *Way vs. Powers*, 57 Vermont, 135, the son of defendant, while living with his father, the hired man on the farm, took his father's horse and drove to the railroad station to meet one of his own friends. This fact was unknown to the father, but he expected and was willing that he should do so. The son had driven the team before without permission. The horse broke away and ran into plaintiff's team, injuring him. It was held that the father was not liable, as his son was not at the time in his employment, not acting upon his business.

In *Fiske vs. Enders*, 73 Connecticut, 338, defendant's coachman was authorized in her absence from town to give her horses needed exercise by driving them in the country. Held that such authorization did not render the defendant liable for her coachman's negligence while he was driving the horses, not for the purpose of exercise, but solely for his own pleasure and amusement in her absence and without her knowledge and consent. Under such circumstances he could not be regarded as acting in the line of his employment.

In *Louisville & Nashville R. R. Co. vs. Gillen*, 166 Indiana, 321, it was held that a complaint by the servant for the loss of his eye caused by a fellow servant's use of a defective hammer, must show that such fellow servant at the time of such injury was in the line of duty and working in the master's service. The Court says (page 324):

> "If the offending employee was not acting in the line of his duty and within the scope of his authority, there can be no liability against the employer. It is a well settled principle of law that a master is not answerable for the acts of his servant committed

outside of the line of his duty and not connected with his master's business, but done in pursuit of some independent purpose of his own, *although the particular injury could not have occurred without the facilities afforded by the relation of the servant to his master.*"

It was held in *Morier vs. St. Paul, etc., R'way*, 31 Minnesota, 351, that a railroad company was not liable for the spreading of a fire caused by its servants kindling a fire to warm their meal, on the ground that the men were not acting in the course of, or within the scope of their employment in connection with the company's business, but for the time being, were acting for themselves and as their own masters, and exclusively pursuing their own ends, and hence the act was their own personal act and not that of the company.

Clark vs. Buckmobile Co., 94 N. Y. S., 771; 107 App. Div., 120: In this case the general manager of an automobile company went to another city on his own affairs. On his return he telephoned for another employee to come to the station for him with an automobile. It was held that the company was not liable as the negligent parties were not engaged in its business.

The case of *Northup vs. Robinson*, 33 Rhode Island, 496, is in point. In that case it was the duty of the servant to drive his master's automobile to the post office for the mails, then to the express office, then back to the master's house. The servant undertook to oblige a third person by carrying a note to that person's house, which was on another road, and which did not lead to the express office, whither he was bound. While so engaged, the accident occurred, and it was held that the servant was on an independent journey and the master was not liable.

The case of *Colwell vs. Aetna Bottle & Stopper Co.*, 33 Rhode Island, 531, is similar. In that case a servant of defendant had been ordered to take a car from one garage of defendant to its other garage, and there wash the car and

put it up for the night. After he had driven the car to the garage as directed, without permission or authority from defendant, and against its express general orders, he took the car to carry another employee to his home, and after driving to a restaurant for his supper, was returning to the garage when the accident occurred. It was held that the servant was not acting within the scope of his employment, and defendant was not liable for injuries caused by his servant's negligence while acting for himself.

A recent case is that of *Doran vs. Thomsen*, 74 N. J. Law 445, 71 Atlantic Rep. 296. In that case it was held that a father could not be held for the negligence of his nineteen year old daughter who was operating his machine, but for her own pleasure, and that she was not the servant of her father. The Court further held that:

> "The act must be done for the purpose of executing the master's orders and doing his work, and while actually engaged in serving the master, *and it is not enough to say that the injuries complained of would not have been committed without the facilities afforded by the servant's relation to his master.*" Citing numerous cases relating to automobiles.

To recapitulate: (1) Subdivision 3 of Section 10 of Act No. 318, Public Acts of 1909 of the State of Michigan, having been held invalid, the defendant in error has no statutory right of action; and (2) the servant of the plaintiff in error, who was operating the motor car in question, having acted outside the scope of his authority, and not upon the business of the plaintiff in error, but for his own pleasure, defendant in error has no common law right of action.

We respectfully submit that the judgment of the District Court for the Eastern District of Michigan, should be reversed with costs.

JOHN C. DONNELLY,
HENRY L. LYSTER,
Counsel for Plaintiff in Error.

(23,305)

Supreme Court U. S.
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MAR 14 1914
JAMES D. MAHER
CLERK

Supreme Court of the United States

(October Term, 1913, No. 309.)

METZGER MOTOR CAR COMPANY,
Plaintiff in Error,
vs.
JOHN W. PARROTT,
Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Michigan.

BRIEF FOR DEFENDANT IN ERROR.

THOMAS A. E. WEADOCK,
SILAS B. SPIER,
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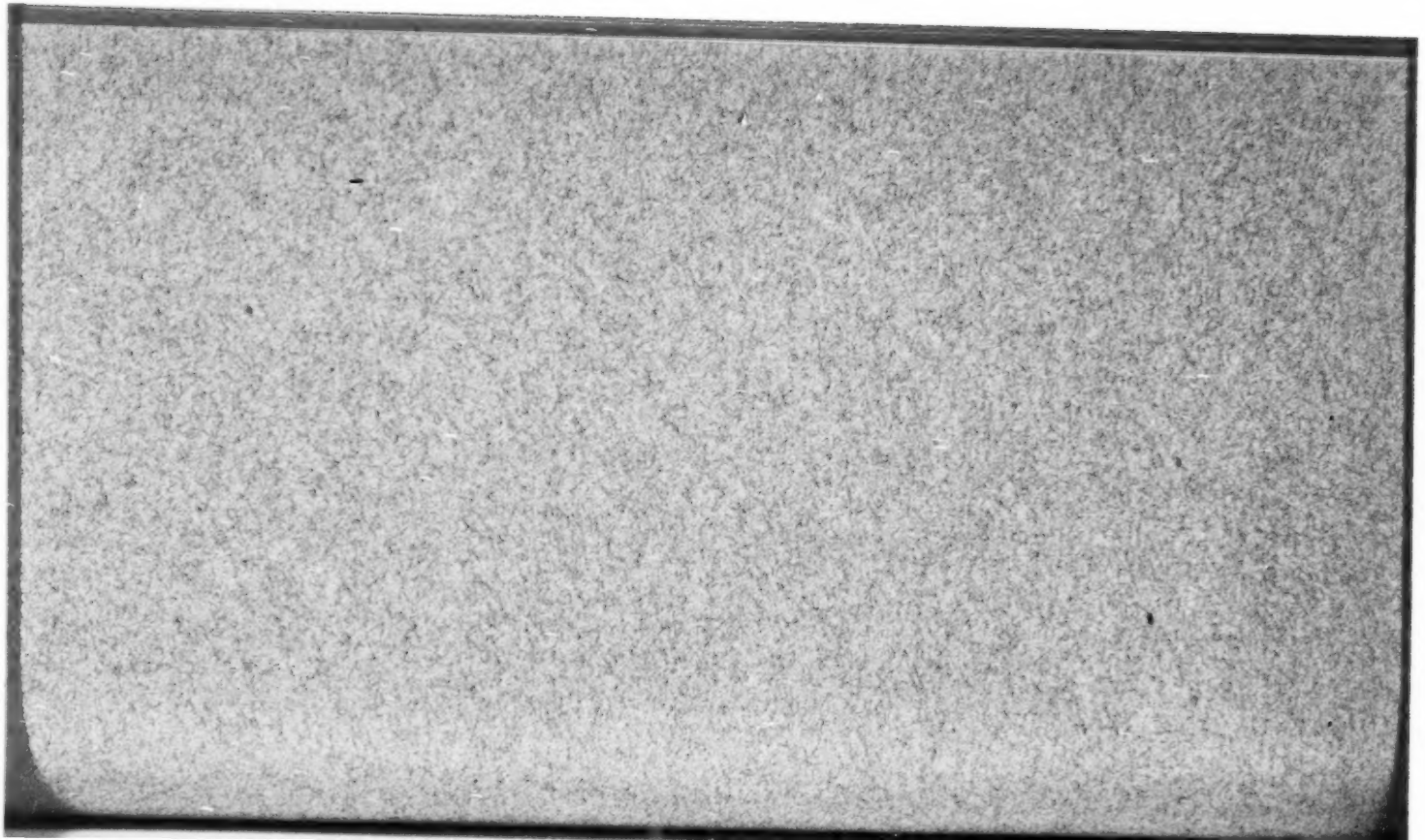
DETROIT:
CONWAY BRIEF CO., 143-149 LAFAYETTE BOULEVARD.
1914.



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(23,305)

Supreme Court of the United States

METZGER MOTOR CAR COMPANY,
Plaintiff in Error,
vs.
JOHN W. PARROTT,
Defendant in Error.

(October Term, 1913, No. 309.)

STATEMENT OF CASE.

The plaintiff (defendant in error) John W. Parrott was injured on the 12th day of July, 1910. He commenced suit against plaintiff in error, the Metzger Motor Car Company, which was then a corporation duly organized under the laws of the State of New York, but doing business in the State of Michigan. Said suit was commenced September 10th, 1910, in the Macomb County Circuit Court of the State of Michigan. It was transferred to the District Court on the 14th day of April, 1911. It was there tried and a verdict rendered by the jury on the 13th day of December, 1911. Judgment on said verdict was duly entered on the 18th day of May, 1912, after a motion for a new trial had been duly made, submitted and denied by the court.

Act No. 318 of the Public Acts of Michigan for the year 1909, was approved June 2nd, 1909, and became effective January 1st, 1910. The act is entitled "An Act Providing for the Registration, Identification and Regulation of Motor Vehicles operated upon the Public Highways of this State, and of the Operator of such Vehicles." This act is known as the "Michigan Motor Vehicle Law," and consists of eighteen sections covering eleven pages. (772-782).

The Act defines the words Motor Vehicle, Chauffeur, State, Owner and Public Highway, as used therein. It requires the owner of every motor vehicle to register with the Secretary of State and to pay a fee therefor. The Secretary of State is required to keep a register book and to furnish to each applicant a register number plate. It requires the Secretary of State to furnish the clerk of every county with a list of all motor vehicles so registered, the name of the owner, residence, etc. It provides for duplicate sets of numbers for manufacturers, and requires re-registration annually. Section six thereof prescribes the safety appliances, brakes, horns, lamps, et cetera, that must be used, and also prescribes the stopping signal for the operators of all motor vehicles. It also prescribes the law of the road for the operation of such vehicle, and requires that in case of accidents the operator of the motor vehicle shall stop and when requested give his name, address, etc. Section seven prescribes the rate of speed and approaching, warning, etc. It authorizes local authorities to make further reasonable regulations. Section eight requires registration of chauffeurs. Section ten in whole is as follows:

> "Sec. 10. Subdivision 1. Penalties.—Any person violating any of the provisions of this act and who shall be convicted thereof, or who shall plead guilty to any complaint for the violation thereof, shall be punished by a fine not exceeding twenty-five dollars and costs of prosecution; or if such fine be not paid then by imprisonment in the county jail for not exceeding ten days; for the

second offense he shall be punished by a fine not exceeding fifty dollars and costs of prosecution; or if such fine be not paid then by imprisonment in the county jail for not exceeding thirty days; and for a third, or any subsequent offense, he shall be punished by a fine not exceeding one hundred dollars and costs of prosecution or by imprisonment in the county jail or the Detroit House of Correction for a period not exceeding thirty days, or by both such fine and imprisonment.

Sub. 2. Civil Actions.—Nothing in this act shall be construed to curtail or abridge the right of any person to prosecute a civil action for damages by reason of injuries to person or property resulting from the negligence of the owner or operator or his agent, employe or servant, of any such motor vehicle, or resulting from the negligent use of the highway by them or any of them.

Sub. 3. Liability of Owners.—The owner of a motor vehicle shall be liable for any injury occasioned by the negligent operation by any person of such motor vehicle, whether such negligence consists in violations of the provision of a statute of this state or in the failure to observe such ordinary care in such operation as the rules of the common law require; but such owner shall not be so liable in case such motor vehicle shall have been stolen."

The other provisions of the Act provide methods for the enforcement thereof, punishment of offenders, etc.

The legislative intent and purpose of this Act is perfectly plain and is easily understood.

The manufacturers of automobiles test their machines upon the public highway, and in the State of Michigan, at times, there are hundreds of testers out upon the public highways to work out the machines of their employers. In case of an accident it would be impossible many times to find the person responsible therefor were it not for this law requiring the number plate to be placed in a visible place upon every machine operated. No better illustration of the efficiency of this law could be given than the facts relative to the accident in the case at bar. The defendant in error, John W. Parrott, in company with one Thomas Barry (pages

21-22-23-24 and 25 of Record) went to Detroit on the morning of 12th of July, 1910, to purchase some horses. They went from Mt. Clemens to Detroit on the trolley line, Rapid Railroad, which is located on the easterly side of the Gratiot Turnpike Road (so called). (The main thoroughfare between Mt. Clemens and Detroit). They purchased three horses, a two wheeled cart, and in the evening of said day returned along said Gratiot Road to Mt. Clemens. Mr. Parrott's fourteen year old boy was with him. They were driving one horse and leading one in front and one behind. Between 11 and 12 o'clock of that evening, when they had reached a point about four miles from Mt. Clemens (about 17 miles from Detroit), they were overtaken and run down by an automobile. They were driving carefully and the machine had no head-light and gave no signal, but while going at a rapid rate, ran them down. The automobile ran upon the track of the trolley line; a car was coming from Mt. Clemens, and was signalled by Mr. Barry and stopped. The number of the automobile was then obtained by the motorman of the trolley car. The matter was placed in the hands of the sheriff of Macomb county (R. 25), and he went to Detroit and, with the assistance of the police, discovered that said machine, which was numbered 5106-M, belonged to the Metzger Motor Car Company. The sheriff then went to the office of said company and discovered the machine, which had been injured and ascertained that one Mr. Coulter (tester and chauffeur of said Company) and Mr. Smith, another employe of said company, with their ladies, were in said automobile at the time of the accident. At the time of the trial in the court below Mr. Coulter had deceased (p. 26, R). The only knowledge that Mr. Parrott or Mr. Barry had as to the manner in which said automobile happened to be operated and run that night, by said Coulter, was the statement of defendant's witnesses. From such evidence it is plain that the boys were out for a pleasure ride. They might have been testing the machine, as an incident to

their pleasure ride, but this of course we could not prove, even if true. Had it not been for the above mentioned Act in question, there would have been no number upon the said motor vehicle; it would have been practically impossible to have discovered the owner or the operator thereof.

It appears from the evidence that Mr. Coulter was the trusted chauffeur of Mr. Everett, the President and General Manager of said company. That he took the said motor vehicle upon the order of Mr. Everett and took him to the Michigan Central depot. The plaintiff in error claims that it was then the duty of Mr. Coulter to return said motor vehicle to the shop and that he took his friends out riding without permission. It remains, however, as a fact, that John W. Parrott, defendant in error, was wrongfully injured while lawfully traveling upon the public highway, by the negligent and illegal use of said motor vehicle. It was the legal duty of the owner of said motor vehicle to prevent its being illegally used upon the public highways to the injury of any citizen of the state.

It is plain, from the above illustration, that there is no conceivable way of making said Michigan Motor Vehicle Law effective, in the protection of the citizens of the state, in their lawful rights upon the public streets and highways, except as provided in said law; that is, compelling the owner thereof to prevent the operation thereof upon the public streets or highways of the state contrary to said law.

The first decision of the Michigan Supreme Court, relating to this Act, was the case of *Johnson vs. Sergeant*, 134 Northwestern Reporter, 468; 168, Michigan, 444; decided February 10th, 1912. Counsel for plaintiff in error in commenting upon this decision claims that the question of the constitutionality of Sub. 3 of Sec. 10 of said Michigan Motor Vehicle Law was not directly before the Supreme Court of the State of Michigan, upon the presentation of said case. We have examined the briefs of counsel for

both sides as presented in said case and we find that the question of the constitutionality of the subdivision under consideration was fully discussed. The decision in this case was written by Moore, C. J. and concurred in by Steere, McAlvay, Brooke, Blair and Stone, J. J. Therein we find:

> "The claim of defendant is (a) that Subdivision 3 of Section 10 of the Act is unconstitutional; (b) That the title of the Act is insufficient to sustain the constitutionality of Subdivision 3 of Section 10 of the same; (c) That the liability attempted to be created by Subdivision 3 of Section 10 is beyond the authority of the legislature; (d) That if the Act is valid and constitutional, no action or liability arises thereunder as against the owner of a motor vehicle, until liability for negligence has been established as against the operator of the vehicle * * * (1) It is well recognized that the automobile upon the highway in the hands of an incompetent or reckless driver may result in great injury to person and property. Because of this fact the State, in the exercise of its police power, may pass statutes in relation to the ownership of automobiles and the running thereof. Section 32, Berry's Law of Automobiles; Section, 29, David's Law of Motor Vehicles (2d ed.); Huddy on Automobiles, p. 9; Section 26, Babbitt Law of Motor Vehicles; *Commonwealth vs. Kingsbury*, 199 Mass., 542; 85 N. E., 848, 127, Am. St. Rep., 513; *People vs. Schneider*, 139 Mich., 673, 103 N. W., 172; 69 L. R. A., 345."

(2) This paragraph relates to the title of the Act and holds the same sufficient.

> "(3) The legislature has gone a long way in this statute in fixing the liability of the owner, even though he may not be in fault. *We do not think, however, it can be said to have exceeded its authority under the police power.* See *People vs. Snowberger*, 113 Michigan 86, 71 N. W. 497, 67 Am. St. Rep. 449; *People vs. Worden Grocery Co.*, 118 Mich. 604, 77 N. W. 315; *People vs. Curtis*, 129 Michigan 2, 87 N. W. 1040, 95 Am. St. Rep. 404; *Burrows vs. Delta Transportation Co.*, 106 Michigan 582, 64 N. W. 501, 29 L. R. A. 468 * * *"

The above quotations clearly show that the Court fully and fairly considered and passed upon the constitution-

who undoubtedly read to their fellow members Cooley on Constitutional Limitations, under the title "The Police Power of the States," being chapter 16. They thus learned

> "That growing out of the nature of well ordered civil society that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth is held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitation in their enjoyment as shall prevent them from being injurious, and such reasonable restraints and regulations established by law as the legislature under the governing and controlling power vested in them by the Constitution may think necessary and expedient. This is very different from the right of eminent domain,—the right of government to take and appropriate private property whenever the public exigency requires, which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the Constitution, *as they shall judge* to be for the good and welfare of the commonwealth and of the subjects of the same." They also learned the maxim "Enjoy your own property in such manner as not to injure that of another," which being of universal application it must of course be within the range of legislative action to define the mode and manner in which everyone may so use his own as not to injure another. And again (by this) "general police power of the state, persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state; *of the perfect right in the legislature to do which, no question ever was, or, upon acknowledged general principle, ever can be made so far as natural persons are concerned.*"

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lessly and negligently, and with an utter disregard of the rights of others, lawfully, upon the highway allowed or permitted their machines to be negligently used upon the public highways, to such an extent that in many localities within the state they had become a public nuisance. When injury was done, innocent people killed or maimed for life; when the police would take the automobile number and find the owner, the common and usual excuse as made by the owner was that he was not driving the machine and some one had taken it for a joy ride or without his consent. The testers, hundreds of whom are employed in the City of Detroit, would take the machines of their employers out for a joy ride, as in the case at bar. The legislature of our state then composed of competent men from every section of the state, determined that more drastic legislation was necessary in order to protect the lives and property of the citizens of the State while lawfully about their business upon the public streets and highways of this State.

We each, personally, know of many of these conditions which confronted our legislators at this time. The automobile had come to stay, it was a useful vehicle, for both pleasure and business. Many of our best citizens were using it, but joy-riders, incompetent or drunken chauffeurs, careless boys, girls and women were permitted by the owners of automobiles to abuse the legitimate privileges and rights of the automobile upon the public highway. It was not only the non-users of automobiles upon the public highway that needed and were entitled to a greater protection but also the owners of automobiles, who were law abiding citizens, and operated their machines in accordance with the law. Thus we find the legislators confronted with a serious legislative proposition, under the police powers granted to them by our Constitution. Under the previous decisions of our Supreme Court their reasonably exercised powers were unlimited in the regulation of the public in the use of our streets and highways. There were a number of lawyers in the legislature

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neighborhood which are calculated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent to the like enjoyment of rights by others."
Cooleys' Const. Limitations, p. 572.

In April, 1905, the Michigan Supreme Court decided the case of *People vs. Schneider*, 139 Michigan, 673, upholding the constitutionality of an ordinance of the City of Detroit regulating automobiles. While the cities had passed ordinances regulating automobiles, the Michigan legislature passed its first act in 1905, in June; No. 196, page 287. This act required registration with the Secretary of State and had many of the general provisions found in the law of 1909. In 1907, by Act No. 44, page 47, the legislature passed an Act making it a misdemeanor to take possession of and drive away any automobile or other motor vehicle, in certain cases and provided a penalty therefor.

By Act 304, page 399, the same legislature amended said act No. 196, of 1905, making more specific and enlarging some of the provisions thereof. Section 27, was so amended as to require the Secretary of State to publish a list of all motor vehicles registered and mail a copy to all City and County Clerks, to all Sheriffs and to the Chief of Police or Marshal of every city or village.

The Michigan Motor Vehicle Law.

In June, 1909, Act 318, page 772, was enacted. This Act should be considered and construed with reference to the previous legislation and the decisions of our Supreme Courts, as well as the conditions upon the public highways, resulting from the misuse and negligent use of automobiles thereon. The number of automobiles in use had largely increased. Old people, children, and others were killed or injured upon the public streets and the highways of the state nearly every day. People in certain localities became so angered at the automobile that they were ready to mob it and its drivers. Owners of automobiles, care-

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> horse and use it, because it is not attendant with any such danger as the reckless or careless driving of automobiles and there is no occasion for the exercise of police power as to the driving of farmers' horses by somebody else, *and I say without fear of successful contradiction that the State has the right to enact just such a statute as this for the purpose of regulating the running of automobiles and that it can make the owner of a machine liable, although he did not consent to the taking of it. It follows that it was the intention of the legislature to compel the owners of automobiles to see to it at their own peril that no one acting for them and no one in their employ, that no one, in fact, shall take their automobile and run it recklessly and negligently without making the owner liable unless it is stolen.*"

The Michigan Motor Vehicle Law is not unreasonable. It merely tries to protect human life, and for that purpose requires that the owner of an automobile must so care for and keep it, that it can not be used by any person on the public highway in violation of the law, and if so used the owner must respond by payment of the actual damages done by his machine when thus illegally used, except said automobile be stolen. The effect of this police regulation has been very beneficial to the people compelled to use public highways and streets. It has unquestionably saved many lives and prevented much injury to personal property. Owners of automobiles have protected themselves by insurance. While in some instances the enforcement of this law apparently operates as a hardship, the benefits resulting to the public safety and welfare are so many, that the law should not be declared unconstitutional. Every police regulation of the state, when enforced, operates harshly and unjustly in many instances. Some of which we will refer to later in our argument.

> "The police power of the state is very broad. It embraces its system of internal regulation, by which it is sought not only to preserve the public order and to prevent offences against the state, but also to establish for the intercourse of citizens with citizens, those rules of good manners and good

perhaps counsel for plaintiff in error might reasonably claim that we were audacious in asking this Honorable Court to hold that the Act in question violated no provisions of the 14th Amendment of the Federal Constitution, after the Supreme Court of the State of Michigan had decided both ways thereon, merely because by its last decision it had found the law unconstitutional. As we understand it, this Honorable Court is called upon to test the validity of said "Michigan Motor Vehicle Law" in the light of its present knowledge, with due regard to its former decisions. The decisions of the Michigan Supreme Court should be considered of course, but should be given no more weight than would be given to conflicting decisions of Courts of different States. The determination of the constitutionality of this law by this Honorable Court will of necessity determine the powers of the legislatures of all the States, as to the enactment of similar laws.

Counsel for plaintiff in error have cited the Michigan case of *Barry vs. The Metzger Motor Car Company* (plaintiff in error). This case was tried before the Hon. George W. Smith, Circuit Judge, after the Supreme Court of the State of Michigan had decided the case of *Johnson vs. Sergeant, supra*. Judge Smith in his charge to the jury, in part, said:

> "The State of Michigan has the right to regulate the use of automobiles under the police power of the State and I quote from a decision of the Supreme Court, *Johnson vs. Sergeant, supra*, substantially as follows:
>
> "'It is well understood that an automobile upon the highway in the hands of an incompetent or a reckless driver may result in a great injury to persons and property. Because of this fact the State in the exercise of its police power has passed a statute in relation to the ownership of automobiles and the running thereof.'
>
> "Now it is not necessary for the legislature to undertake to say that the owner of a common driving horse shall be liable to somebody because his hired man or servant or neighbor may take that

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merit is the suggestion that the statute abridges the rights and privileges of citizens; for a corporation cannot be deemed a citizen within the meaning of the clause of the constitution of the United States which protects the privileges and immunities of citizens of United States against being abridged or impaired by the law of a state.

The same observation may be made as to the contention that the statute deprives the defendant of its liberty without due process of law, for the liberty guaranteed by the 14th Amendment against deprivation without due process of law is the liberty of natural not artificial persons. *N. W. Nat'l Ins. Co. vs. Riggs*, 203 U. S. 243, ante 168. Does the statute deprive the defendant of any property rights without due process of law? We answer this question in the negative. Decisions of this Court, familiar to all, and which need not be cited, recognized the possession, by each state, of powers never surrendered to the general government; which powers the state, except as restrained by its own constitution or the constitution of the United States, may exert, not only for the public health, the public morals and the public safety, but for the general or common good for the well-being, comfort and good order of the people. The enactments of a state, when exerting its power for such purposes, must be respected by this Court, if they do not violate rights granted or secured by the supreme law of the land. In view of these settled principles the defendant is not justified in invoking the Constitution of the United States."

We contend, with all earnestness, notwithstanding the criticism of counsel for plaintiff in error, and notwithstanding the second and reversing decision of the Michigan Supreme Court of *Daugherty vs. Thomas, supra*, that the Michigan Motor Vehicle Law, in its entirety, is constitutional.

The amount involved in the case at bar is but little. The principles involved are far-reaching and important to all the citizens of the Nation traveling upon our public streets and highways. Were the question involved a minor one, which only affected the citizens of the State of Michigan,

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> "And we may say further, it is well settled that a corporation cannot claim the protection of the clause of the 14th Amendment, which secures the privileges and immunities of citizens of the United States against abridgement or impairment by the law of a State. *Western Turf Asso. vs Greenberg*, 204 U. S. 359, 51 Law ed. 520, 27 Sup. Ct. Rep. 384."

The plaintiff in error, by its assignments of error, claims that the District Court erred in not determining, as a matter of law, "That Subdivision 3 of Section 10 of Act Number 318 of the Public Acts of 1909 of the State of Michigan, is in violation of Section 1 of the 14th Amendment to the Constitution of the United States." They made a motion to that effect and by their Sixth Request to Charge (page 8 of their brief), so requested. They did not specify therein, which provision of that Section had been violated. In their Seventh Request to Charge (page 9 of their brief), they specified that said act was "unconstitutional for the reason that it abridges the privileges and immunities of citizens of the United States and of this defendant, and further that it deprives the defendant of property without due process of law and also that it denies it the equal protection of the laws." This is only specific claim made.

We submit that the reasoning of this Honorable Court in the two cases last above cited refutes the contention of counsel for plaintiff in error.

In the case *Western Turf Asso. vs. Greenberg*, 204 U. S. 359, 51 Law ed. 520, at page 522 thereof, we quote as follows:

> "But this Court can only pass upon the validity of the statute with reference to the Constitution of the United States. We perceive no reason for holding it to be invalid under that instrument. The contention that it is unconstitutional as denying to defendant the equal protections of law is without merit, for the statute is applicable alike to all persons, corporations or associations conducting places of public amusement or entertainment. Of still less

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ality of the Michigan Motor Vehicle Law in question, and sustained the constitutionality thereof.

Thus we find that at the time the judgment was rendered in the case at bar in the District Court below the Supreme Court of the State of Michigan had held that the provision of the Michigan Motor Vehicle Law, the constitutionality of which is questioned in this Court by plaintiff in error, was a valid and constitutional law. If the plaintiff in error had not appealed from said judgment of the District Court, then said judgment would have remained a valid judgment, notwithstanding the fact that the Supreme Court of the State of Michigan had subsequently reversed its former decision, as to the constitutionality of that provision of the Michigan Motor Vehicle Law in question in the case at bar. We cannot agree with the contention of counsel for plaintiff in error, that because the Supreme Court of the State of Michigan, in the case of *Daugherty vs. Thomas, et al*, cited by them, decided on March 20th, 1913, reversed their former decision, as to the constitutionality of the law in question; that therefore the judgment rendered in the case at bar was thereby invalidated. The law was valid as a legislative enactment in the State of Michigan until repealed or declared invalid by the Supreme Court of the State.

ARGUMENT.

To what extent can the plaintiff in error, which is a New York Corporation, claim the protection of the clause of the 14th Amendment of the Constitution in this Court, to invalidate the judgment rendered against it in the Court below? This question is answered by this Honorable Court in the case of *Selover, Bates & Co. vs. Walsh*, 226 U. S. Reporter 113, 57 Law. Ed. 146. We quote from the last clause of said decision:

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The members of the legislature were also familiar with the many police regulations of the state where the owner of personal property, domestic animals, were made responsible in damages for injuries done by their property. They thus reasoned if the owner of animate, personal property, could be held for damages done by it, that the owner of the inanimate, personal property, might more reasonably be held responsble for the damages which it did, when operated on the public highway contrary to the laws of the land. They knew that the owner of the automobile could control its use. They knew the owner of the animal many times, without fault on his part, had been held for damages done by the animal while without the inclosure of the owner notwithstanding the fact that the owner was in no way negligent or at fault for such animal being away from his premises. The legislature finally concluded that the best method for it to adopt for the protection of the public from the illegal operation of motor vehicles upon the public highway was to make the owner liable for the damages done by his automobile when illegally operated upon the public streets or highways of the State. We submit there is no effective remedy other than to make the owner of the motor vehicle, who has control thereof, to so care for and keep it from the public streets and highways that it will not violate the reasonable law of the road. No one but the owner can do this. He can so do and thus save many lives and thus prevent great injury to the persons and property of law abiding citizens compelled for their daily bread to travel upon our public streets and highways.

This same legislature by Act Number 33, 1909, page 54, prohibited the unauthorized taking or using of an automobile or other motor vehicle by drivers or caretakers thereof or by any other person, making such use a felony. This Act was for the protection of the owner to aid and assist him in keeping his motor vehicle from being illegally operated upon the public highways. Thus we see the legislative purpose of these Acts is to prevent the

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illegal and negligent operation of these powerful machines upon the public streets and highways. Other methods have been tried, but were not effective. Naturally no one would make a complaint against the person who used another person's automobile without permission, except the owner thereof. Therefore it seems to us plain that this provision of the law, Act 33, was solely, in its practical workings, to aid and assist the owner to keep his machine within his control.

It will only be a short time before the Courts will be compelled to pass upon legislative enactments regulating the use of the aeroplane by its owner. The number of automobiles in use is rapidly increasing. Soon we will all have our automobiles, I hope; and those of our fellow citizens who wish to go faster than the laws of the road will permit them to go with their automobiles, will sail through the air with their flying machine.

When our public highways and streets were built, the motor vehicle was not contemplated. We are now improving our highways, but most of our city streets can not be widened. We need but to visit our large cities on a Saturday afternoon to appreciate the difficulties of our states in enacting proper general laws which will protect poor fellows who have to go afoot. In 1912, as I am informed, there were eighteen fatal accidents to persons, and two hundred and sixty three personal injury cases, reported to the police, in the City of Detroit, Mich. There were other accidents not officially reported, some where machines were abandoned after having been disabled and some where parties, for some reason, did not wish their accidents known. If this law is sustained it will be modified from time to time in the wisdom of the legislature. It should not be construed in the light of the last generation, but should be considered with reference to the conditions which now exist upon our public streets and highways.

We find that in Ontario a law was enacted, with the following provision, "Section 13. The owner of a motor vehicle, for which a permit is issued under the provisions of this act, shall be held responsible for any violation of the act or of any regulation provided by the order of the Lieutenant Governor and in Council." See *Mattei vs. Gillies*, decided April 23rd, 1908, Am & Eng. A. C., Vol. 12, page 970. The Court holds "It was open for the jury to find that the act had been violated as to the requirements of Section five which provides that the horn is to be sounded whenever it shall be reasonably necessray to notify pedestrians or others of the approach, etc.," "As to such and other violations, the owner of a motor for which a permit is used 'shall be held responsible.'" Section 13 (This is the section 13 above quoted). That would cover responsibility in regard to fines and penalties imposed by the act and may it not also civil responsibility for damages? Section 12 which preceeds this section, as to responsibility, incorporates the provisions of the Act relating to traveling on public highways, one section of which, section 14, is important in this relation. This declares "That no such fine or imprisonment shall be a bar to the recovery of damages by the injured party before a Court of competent jurisdiction." The collation of the sections suggests that a liberal reading is to be given to the responsibility clause, as is, indeed, the general canon to be observed in the interpretation of the revised and other statutes. * * * This clause as to general responsibility for the negligent conduct of this swift and noiseless source of danger on the streets is not unique or even singular."

In several of the States of the American Union similar or analagous provisions are to be found. Thus in North Dakota, it is enacted in one section (Section 5) That any person whether driver or operator of the automobile, or the owner thereof, whose agents the driver or operator shall be, who shall violate any of the provisions of this Act, shall be punished by fine; and in addition the owner

shall be liable for damages in a civil action to any person injured by reason of such violation. Huddy's Law of Automobiles 263. In Tennessee it is provided by Statute that whenever a suit for damages is brought for injuries caused by the running of a motor in violation of the Act, there shall be a lien on the machine for the satisfaction of the amount recovered whether the automobile at time of injury was driven by the owner or by the chauffeur, agent, employe, servant, or any other person using the same by loan, hire, or otherwise. Para Section 5 Huddy's, p. 310 and Section 4 Act of 1902, Huddy's p. 313.

The Michigan legislature of 1909 enacted further advanced legislation by Act 104, which was before the Court for construction in the case of *Sousmith vs. Pere Marquette Railroad Company*, 138 N. W. Rep., 347. This case and this law was persistently fought by the corporations interested. It was claimed by some of the attorneys to be revolutionary in its effect. It did revolutionize the law relating to the liability of common carrier railways, but it was a wholesome law for the hard working employes of companies. Because of this law better service will be provided for the public and less accidents will result by reason of over-worked employes. We quote from page 335 of this decision:

> "A person has no property, no vested interest in any rule of the common law. That is only one of the forms of municipal law and is no more sacred than any other."

At a special session of the Michigan legislature in 1912, Act Number 10, the Employers' Liability Law was passed, and is now in successful operation. This Act certainly was the most advanced legislation within this State, in the interest of humanity, for many, many years. I can find no police regulation of the States which has been declared unconstitutional by this Honorable Court for many years merely because the enforcement thereof worked a hard-

ship upon some person. I think the duty of the Court in this regard is well stated in Cooley on Constitutional Limitations page 164,

> "Nor can a Court declare a statute unconstitutional and void solely on the ground of unjust and oppressive provisions or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights guaranteed or protected by the Constitution." Again on page 169 "If the Courts are not at liberty to declare statutes void because of their apparent injujstice or impolicy, neither can they do so because they appear to the minds of the judges to violate fundamental principles of republical government, unless it shall be found that those principles are placed beyond legislative encroachment by the Constitution."

In the case of *Holmes vs. Murray*, 207 Mo., 413; 13 Am. & E. A. C. page 845 the constitutionality of a law making the owner of a dog liable for injuries done by it was questioned. This seems surprising as but few cases are cited where this question has been raised. Some of them are found in the Annotations of said case. The Court says:

> "The contention is that this section undertakes to hold him liable for the vicious habits and traits of his dogs or those harbored by him, regardless of his knowledge of their vicious character, and that the enforcement of this statute would deprive him of his property without due process of law. This is a misconception of the meaning of the constitutional provision referred to. This Court in the discussion of that section of the Constitution, said in the case of *Matthews vs. St. Louis Railroad Company*, 121 Mo., 322, 'We accept Mr. Webster's definition of the law of the land; by the law of the land is most clearly intended the general law, a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property and immunities under the protection of the general rule which govern society.' There is nothing in the statute which denies the defendant any of these rights; but, on the other hand, the defendant was duly summoned to appear

and defend the suit; he was given a full and careful hearing and after a complete inquiry as to both the law and the facts of the case, he was adjudged to pay the damage. That is all the letter or the spirit of the constitution guaranteed unto him. The legislature in no manner attempted to deprive defendant of his property without due process of law, but simply changed the common rule of his liability so as to impose a stricter liability."

As a further illustration of making the owner of personal property liable for damages done by it without his negligence, I would call the Court's attention to *Shipley vs. Colclough*, 81 Michigan, 624. Defendant claimed that even if his cattle were at large plaintiff could not recover, because the circumstances did not constitute actionable negligence, and because it was not shown that the cows had any vicious or dangerous habits or propensity which would have led defendant to anticipate and guard against such injury. The Court says:

"In turning a herd of cattle into the highway, and going away and leaving them unattended by anyone, defendant violated a statute of this state and he assumed all the risks of such action. The authorities are almost uniform that 'The violation of any statutory or valid municipal regulation established for the purpose of protecting persons or property from injury, is of itself sufficient to prove such a breach of duty as will sustain a private action for negligence, if the other elements of actionable negligence concur' 1 Shear & R. Neg. 13. These principles apply, not only where the statute or ordinance declares that persons violating it shall be liable for any damage sustained by reason of its breach, but also where it contained no such provision and simply imposes a penalty, by way of fine or otherwise for disobedience, nor is the plaintiff, in such a case, bound to prove that the act required by the law was one which by its nature was essential to the exercise of due care by the defendant."

See *People vs. Eberle*, decided Dec. 1911, 133 N. W. Rep. 519 (Mich.). In this case it was the contention of the de-

The court held the defendant liable under the statute.

fendant that the law was unconstitutional. Under the local option law defendant's property became practically worthless because of the prohibition of the use thereof by the owner for the purposes for which it was intended. On page 522 the Court says:

> "A prohibition simply upon the use of property for the purposes that are declared by valid legislation to be injurious to the health, morals or safety of the community can not in any just sense be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by anyone for certain forbidden purposes is prejudicial to the public interests."

It is conceded that Act Number 318 (Michigan Motor Vehicle Law) is a valid police regulation and constitutional in all respects except the provision making the automobile's owner responsible for damages done by it. The Act only makes the owner responsible when his automobile, his personal property, is used illegally on the public streets or highways. He can prevent its illegal use and for the benefit of human life and the safety of property should be willing so to do. I find no provision of the Constitution giving to any citizen the right to use or to permit to be used property belonging to him in violation of the laws of the land. Simply because the common law has not made the owner of a motor vehicle responsible for damages done by it, is no reason why the legislature should not so do. When there were few automobiles, the dangers resulting to the public from their use upon the streets and highways was not so great, but in 1909, the number of motor vehicles in use in this State had become enormous and we submit the legislature wisely said to the owner, you must keep your automobile in the hands of persons who will so far regard the rights of their fellow travelers upon the public highway that they will not do them or their property injury in violation of the laws of the State.

We should not look too tenderly or too sympathetically upon the owner of the automobile who unfortunately, directly or indirectly, permits his automobile to be so used as to injure his fellow citizen. It was within his power to prevent such injury, but the person or persons injured while lawfully upon the public street or highway could not prevent such injury or prevent such automobile being illegally operated, but by reason of the illegal act of said automobile the injured person may suffer great personal injury, pain and suffering, and perhaps death. It is a well settled principle of law, and we think applicable to the instant case, that where one of two persons must suffer, he should suffer through whose fault the injury resulted. The owners of the dog and other domestic animals are made responsible for the damages done by their animals upon the principle that it is within their power to control them and if they neglect so to do, the innocent sufferer is entitled to compensation from them for their injuries. We submit that the dogs of the state have done less damages in the past year than the automobiles. A dog or bull at large, upon the public highway, would not be as dangerous as an automobile operated in a crowded city by a drunken or incompetent chauffeur or driver.

The legislature has the power to make the owner of property which is liable to do injury to the public, responsible for the damages done by his personal property. If I contract for the erection of a building upon my property and keep and perform my contract and pay the price for the construction of said building, under the valid laws of this State, if the contractor cheats the material man or the laborer out of the money due to him for labor or material furnished for my house, then I can be compelled to pay them, to the amount of the contract price. The principle of law involved is this. I have the power to withhold payment to the contractor until I know that the laboring man and material man are compensated. In the interests of society and fair dealing the law has made it my

duty so to do. It is needless to multiply illustrations. I fear that I have already been too verbose.

Police Power of the State.

The following cases refer to the power of the Legislature to enact laws under the exercise of the Police Power vested therein.

In the case of *City of Chicago vs. Frank Sturges*, 222 U. S. 310-313; 56 L. ed. p, 215 etc., the Federal Supreme Court held that a *municipality could be held liable for three fourths of the damage to property within its limits caused by a mob or riot*, as is done by Illinois Laws, 1887, p. 237, which saves to the owner his action against the rioters and gives the municipality a lien upon any judgment against such participants for reimbursement, or a remedy to the municipality direct against the individuals causing the damage to the amount of any judgment it may have paid the sufferer, *is a valid exercise of the police power, and does not deny to the municipality due process of law because it imposes liability irrespective of any question of the power of the municipality to have prevented the violence, or negligence in the use of its power.*

A city is not denied the equal protection of the laws by Illinois Laws 1887, p. 237, imposing upon it a liability for damages to property within its limits, caused by a mob or riot, because when property damaged under like circumstances is situated in a village or other incorporated town, the liability is imposed upon the county instead of upon such village or town.

Mr. Justice Lurton in the opinion of the Court, in part, said: "The law in question is a valid exercise of the police power of the State of Illinois. It rests upon the duty of the State to protect its citizens in the enjoyment and possession of their acquisitions, and is but a recognition of the obligation of the state to preserve social order and the property of the citizen against the violence of a riot or mob."

And immediately preceding the last statement, the Court says: "It is a general principle of our law that there is no individual liability for an act which ordinary care and human foresight could not guard against. It is also a general principle of the same law that a loss from any cause purely accidental must rest where it chances to fall. But behind and above these general principles which the law recognizes as ordinarily prevailing, there lies the legislative power, which, in the absence of organic restraint, may, for the general welfare of society impose obligations and responsibilities otherwise non-existent.

Primarily, governments exist for the maintenance of social order. Hence it is that the obligation of the government to protect life, liberty, and property against the conduct of the indifferent, the careless, and the evil minded, may be regarded as lying at the very foundation of the social compact. A recognition of this supreme obligation is found in those exertions of the legislative power which have as an end the preservation of social order and the protection of the welfare of the public and of the individual. If such legislation be reasonably adapted to the end in view, affords a hearing before judgment, and is not forbidden by some affirmative provision of the constitutional law, it is not to be regarded as denying due process of law under the provisions of the 14th Amendment."

In the case of *Kidd, Dater & Price Company, Plff. in Err., vs. Musselman Grocer Company*, 217 U. S. 459-461; 54 L. ed. p. 839, the headnote reads as follows: "The Michigan Sales in Bulk Act (Pub. Acts 1905, No. 223), avoiding, as against creditors, sales in bulk otherwise than in the regular course of business, unless an inventory is made at least five days before the sale, and the purchaser receives a list of the seller's creditors, and notifies them of the proposed sale personally, or by registered mail, at least five days before its consummation, and making a purchaser not conforming to the statute a receiver for the

benefit of the seller's creditors, is a valid exercise of the police power, and does not deny due process or the equal protection of the laws."

In the case of *North American Cold Storage Company, Appt. vs. City of Chicago, et al.*, 211 U. S. 305-306; 53 L. ed. 195 etc., headnote three reads as follows:

"3. Due process of law is not denied the owner or custodian of food in cold storage by a municipal ordinance under which such food, when unfit for human consumption, may summarily be seized, condemned, and destroyed by municipal officers without a preliminary hearing."

Mr. Justice Peckham, in the opinion of the Court, in part, said. "There is but one question in this case and that is, Is section 1161 of the Revised Municipal Code of Chicago in conflict with due process of law provision of the 14th Amendment, in this; that it does not provide for notice and an opportunity to be heard before the destruction of the food products therein referred to? * * * We are of the opinion, however, that provision for a hearing before seizure and condemnation and destruction of food which is unwholsome and unfit for use is not necessary. The right to so seize is based upon the right and duty of the state to protect and guard, as far as possible, the lives and health of its inhabitants, and that it is proper to provide that food which is unfit for human consumption should be summarily seized and destroyed to prevent the dangers which would arise from eating it. The right to so seize and destroy, is, of course, based upon the fact that the food is not fit to be eaten. Food that is in such a condition, if kept for sale or in danger of being sold, is in itself a nuisance, and a nuisance of the most dangerous kind, involving, as it does, the health, if not the lives, of persons who may eat it."

In the case of *Commonwealth vs. Kingsbury*, 85 N. E. 848 (Massachusetts) the first headnote reads "Regulation

of the use of automobiles on particular roads, even to their complete exclusion therefrom, provided for by St. 1905, p. 289, C 366, para. 1, as amended by St. 1906, p. 425, C 412, para. 9, is within the police power, with a view to the safety of the public.

Knowlton, C. J. in the opinion of the Court, said "The right of the legislature, acting under the police power, to prescribe that automobiles shall not pass over certain streets or public ways in a city or town, seems to us well established both upon principle and authority."

In the case of *Brown et al., vs. Board of Education Com'rs of Kent County*, Supreme Court of Michigan, decided March 29th, 1913, 140 N. W. 642, headnote three reads as follows:

"3. The remedy for the enactment of an unreasonable statute is in the legislature, and not in the courts, if the legislature did not exceed its constitutional powers in enacting the statute." BIRD, J. in the court's opinion, in part said, "(3) * * * It is certain, however, that, if we are to have a primary law, somebody must be invested with the power to prescribe the rules and regulations under which a primary election shall be conducted. That power resides in the legislature. *If the legislature* has exercised that power, and *while acting within the range of its authority has prescribed an unreasonable regulation, it must be remedied by it, and not by the courts. City of Detroit vs. Election Inspectors*, 139 Mich. 557, 102 N. W. 1029, 69 L. R. A. 184, 111 Am. St. Rep. 430, 5 Ann. Cas. 861. The same question has been many times before other state courts and with few exceptions it has been held that it was a legislative power."

New York Life Insurance Company vs. Hamburg, Vol. 140 N. W. R. 510 (Michigan, March 20, 1913), "Even if, in the opinion of the court, this statute might be considered

unwise from the standpoint of the public interests, nevertheless, unless it conflicts with the Constitution of the state or of the United States, the legislative determination is final."

The following cases refer to, under what conditions the Supreme Court of a State can declare a State law unconstitutional, which law was made by the State Legislature under the Police Power.

In the case of *Kidd, Dater & Price Company, Plff.*, in *Err., vs. Musselman Grocer Company, supra* (217 U. S. 459-561; 54 L. ed. p. 839 etc.).

Mr. Justice White, in the opinion of the Court, in part, said: "As the subject to which the statute relates was clearly within the police power of the state, the statute cannot be held to be repugnant to the due process clause of the 14th Amendment, because of the nature or character of the regulations which the statute embodies, *unless it clearly appears that those regulations are so beyond all reasonable relation to the subject to which they are applied as to amount to mere arbitrary usurpation of power. Booth v. Illinois*, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425. This, we think, is clearly not the case." See also *Lawton v. Steele*, 152 U. S. 133, 136, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; *Holden v. Hardy*, 169 U. S. 366, 392, 42 L. ed. 780, 791, 18 Sup. Ct. Rep. 383; *Lemieux v. Young*, 211 U. S. 489, 53 L. ed. 295, 29 Sup. Ct. Rep. 174.

The provisions of the 1st section of the 14th Amendment do not guarantee to the individual citizen the unqualified right to do as he chooses with his property, regardless of the rights of others; but such rights are subject to such reasonable restraint, under the police power of the state, as the law-making power may prescribe for the benefit of all the people. Crowley v. Christensen, 137 U. S. 86, 89, 90, 34 L. ed. 620-623, 11 Sup. Ct. Rep. 13; *Corfield v. Coryell*, 4 Wash. C. C. 381, Fed. Cas. No. 3,230; *Slaughter House*

Cases, 16 Wall. 36, 76, 21 L. ed. 394, 408; *Cooley Const. Lim.* 6th ed, 739-743; *Pool v. Trexler*, 76 N. C. 297; *State v. Heinemann*, 80 Wis. 256; *Porter v. Ritch*, 70 Conn., 254, 39 L. R. A. 353, 39 Atl. 169; *Com. v. Alger*, 7 Cush. 85; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25-32, 24 L. ed. 989-991; *Mugler v. Kansas*, 123 U. S. 623-655, 31 L. ed. 205-211, 8 Sup. Ct. Rep. 273; *Ward v. Farwell*, 97 Ill. 609; *St. Louis & S. F. R. Co. v. Matthews*, 165 U. S. 1-23, 41 L. ed. 611-619, 17 Sup. Ct. Rep. 243; *Jacobson v. Massachusetts*, 197 U. S. 11-27, 49 L. ed. 643-650, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 520; *Cooley Const. Lim.* 6th ed. p. 743.

The "unreasonableness of a law" is not a subject for judicial cognizance.

Missouri P. R. Co. v. Mackey, 127 U. S. 205, 208, 2 L. ed. 107, 108, 8 Sup. Ct. Rep. 1161; *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 520, 29 L. ed. 463-465, 6 Sup. Ct. Rep. 110; *Mugler v. Kansas*, 123 U. S. 632, 660, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; *Powell v. Pennsylvania*, 127 U. S. 678, 686; 32 L. ed. 253, 257, 8 Sup. Ct. Rep. 992, 1257; *People v. Snowberger*, 113 Mich. 86, 67 Am. St. Rep. 449, 71 N. W. 497; *People v. Worden Grocer Co.*, 118 Mich. 608, 77 N. W. 315; *Barton v. McWhinney*, 85 Ind. 488; *Bertholf v. O'Reilly*, 74 N. Y. 516, 30 Am. Rep. 323; *Reeves v. Corning*, 51 Fed. 787; *Territory ex rel. McMahon v. O'Connor*, 5 Dak. 412, 3 L. R. A. 355, 41 N. W. 746.

We respectfully submit that the judgment of the District Court for the Eastern District of Michigan should be affirmed, with costs.

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